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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTHERN MOTOR CARRIERS
RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS
ASSOCIATION, INC.

and

NATIONAL ASSOCIATION of
REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT "B"

119pr

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QUESTIONS PRESENTED FOR REVIEW

The Interstate Commerce Act authorizes, but does not compel, motor common carriers of property to engage in the collective formulation of interstate rate proposals pursuant to agreements filed with and approved by the Interstate Commerce Commission. 49 U.S.C. § 10706(b). Most of the states authorize, but do not compel, the collective formulation of intrastate rate proposals by motor common carriers of property. Against this background, the questions presented are as follows:

1. Whether, in disregard of controlling decisions of this Court involving the state action doctrine, the court below erroneously inferred a Congressional intent to condemn under the federal antitrust laws activities conducted in intrastate commerce which are expressly authorized and immunized from those laws when conducted in interstate commerce?

2. Whether, contrary to prior decisions of this Court and of the Courts of Appeals for the District of Columbia and Ninth Circuits, the Court below erroneously construed the "state action" doctrine to require as a prerequisite to its application that a state formally compel private parties to act in a manner violative of federal antitrust laws?

3. Whether, contrary to prior decisions of this Court, the court below erroneously held that the *Noerr-Pennington* doctrine is inapplicable to the collective formulation of rates to be proposed to the state regulatory commissions?

PARTIES

The caption of this Petition contains the names of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the District Court. Neither Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., nor the National Association of Regulatory Utility Commissioners has any parent, subsidiary or affiliated companies.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT "B"

Southern Motor Carriers Rate Conference, Inc. ("SMCRC"), North Carolina Motor Carriers Association, Inc. ("NCMCA") and the National Association of Regulatory Utility Commissioners ("NARUC"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, Unit "B," in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, attached as Appendix A, is reported at 467 F. Supp. 471 (N.D. Ga. 1979). The opinion of the Fifth Circuit, Unit "B," attached as Exhibit B, is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). An order granting rehearing *en banc* is attached as Appendix C. The opinion of the Fifth Circuit, Unit "B," on rehearing, attached as Appendix D, is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983).

JURISDICTION

The judgment of the Fifth Circuit, Unit "B," was entered on April 5, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was granted by order on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B," was entered on April 11, 1983. On April 21, 1983, Petitioners moved the Fifth Circuit, Unit "B," for a stay pending the filing of this petition for writ of certiorari. By order dated May 6, 1983, attached as Appendix E, that court granted the motion and stayed its mandate up to and including May 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 1981), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

Respondent United States of America brought this antitrust action in the United States District Court for

the Northern District of Georgia seeking injunctive relief for alleged violations of Section 1 of the Sherman Act.[1] Petitioners SMCRC and NCMCA are associations of motor common carriers of property through which their members collectively propose rates to the appropriate state regulatory authorities. Petitioner SMCRC conducts its intrastate activity in the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee.[2] Petitioner NCMCA conducts its activity in the State of North Carolina. Petitioner NARUC is an association of state regulatory commissioners, whose duties include the oversight and regulation of intrastate motor common carriers.

Respondent alleged that Petitioners SMCRC and NCMCA, by virtue of their conduct in collectively formulating rate proposals to be filed with the various state regulatory commissions, were engaged in a conspiracy to fix prices.[3] It is undisputed that collective rate schedules prepared by Petitioners SMCRC or NCMCA have to be submitted to the regulatory commissions in those states in which the rates are to be effective. Nor is it disputed that the state commissions exercise careful review over rate filings. The district court found that:

> Procedures within each commission for review of published rates tend to be uniform. A published rate

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[1] 15 U.S.C. § 1 (Supp. 1983).

[2] SMCRC also functions as the agency through which its members collectively propose rates to the Interstate Commerce Commission for interstate transportation within the South and between the South and much of the rest of the country. In so doing, it employs precisely the same procedures as it employs in the case of intrastate rates. The various state regulations and the role of the rate conferences were described in more detail by the district court. Appendix A at 3a-7a.

[3] Appendix A at 2a.

> goes into effect unless set down for a hearing by the commission. The commissions consistently require hearings, however, and an order scheduling a hearing automatically suspends a proposed tariff.[4]

In the district court, Petitioners argued, *inter alia*, that their conduct was immune from the federal antitrust laws by virtue of the state action doctrine and the *Noerr-Pennington* doctrine. Petitioners argued that the conduct did not violate the Sherman Act, since it was the state regulatory commissions which actually set the rates in response to a petition submitted by Petitioners.

On cross-motions for summary judgment, the district court held that the state action doctrine did not apply because the involvement of the state regulatory commissions did not amount to state compulsion[5] and that *Noerr-Pennington* did not apply because the court believed it could "accord independent significance to the defendants' activities of rate formulation and proposal."[6] The court recognized the obvious principle that:

> If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.[7]

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[4] Appendix A at 9a.

[5] Appendix A at 21a-22a. The Court held that compulsion was established as a prerequisite to state action in *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975). Appendix A at 18a.

[6] Appendix A at 26a.

[7] Appendix A at 25a.

Nonetheless, the court concluded that, "Even though the proposals require state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decision-maker."[8] Finally, the district court found that the conduct constituted price fixing in violation of the Sherman Act notwithstanding the requirement that the proposed rates be submitted to the state regulatory commissions.[9]

On appeal, a divided Panel of the Fifth Circuit, Unit "B," affirmed. Judge Johnson, joined by Judge Scott of the Middle District of Florida, sitting by designation, agreed with the district court that compulsion is a prerequisite to application of the state action doctrine. The majority interpreted this Court's recent decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*,[10] as not altering a *Goldfarb* compulsion requirement.[11] Judge Hill dissented, finding that *Midcal* established a two-pronged test for state action which served the same interests as a compulsion requirement:

> By requiring that a state actively supervise the implementation of its economic policy, the *Midcal* test ensures that the *state* has determined that the challenged activity is in furtherance of the *state's* policy.[12]

As to *Noerr-Pennington*, the Panel majority agreed with the district court that the initial step of collectively formulating a rate proposal could be viewed separately from the act of presenting the proposal to the state regulatory commissions. So viewed, the majority held that

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[8] *Id.*

[9] Appendix A at 28a.

[10] 445 U.S. 97 (1980).

[11] Appendix B at 36a-39a.

[12] Appendix B at 55a (Hill, J., dissenting) (emphasis in original).

Noerr-Pennington did not protect the collective formulation of rates despite Respondent's implicit concession that the presenting of the proposed rates is protected activity.[13] Finally, the majority concluded that the activity at issue constituted price fixing in violation of the Sherman Act.[14]

On rehearing *en banc*, a divided court of appeals affirmed, 8-4. Judge Johnson, again writing for the majority, reiterated the view he expressed in the Panel opinion that *Midcal* did not alter a *Goldfarb* compulsion requirement.[15] Judge Hill, again in dissent, expressly recognized the conflict between the holding of the majority and the "clear and explicit" holding of this Court in *Midcal*.[16]

Petitioners submit that Judge Hill's interpretation of *Midcal* is correct in finding that "[u]nlike the arbitrary compulsion requirement," the two-pronged test "affords states greater flexibility in the formulation of constructive regulatory programs so long as the state clearly and affirmatively expresses its intent to do so and remains continuously and actively involved."[17]

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[13] Appendix B at 43a-44a.

[14] Appendix B at 46a-47a.

[15] Appendix D at 73a-74a.

[16] Appendix D at 81a (Hill, J., dissenting).

[17] Appendix D at 84a (Hill, J., dissenting).

REASONS FOR GRANTING THE WRIT

(a) This Case Is Of Exceptional National Importance Because Of Its Critical Impact On The Regulation Of Motor Common Carriers By The States

This case is of crucial importance to the regulation of the intrastate rates of motor common carriers by the several states. It immediately affects adversely the implementation of the regulatory schemes of five states (Alabama, Georgia, Mississippi, North Carolina and Tennessee) located in four federal judicial circuits (Fourth, Fifth, Sixth and Eleventh). As the District Court said in granting Petitioner NARUC leave to intervene as a party defendant:

> "Whether these five commissions will be able to continue in their present ratemaking routines is an essential question posed in this litigation. A negative answer to this question will necessarily impede or impair the commissions' interest in continued use of the present rate conferences. *The answer will not be one of general policy preference but of immediate legality of the conference system.* NARUC's proposed representation of the interests of these five commissions thus satisfies the real interest and potential harm prerequisites of intervention, Rule 24(a)(2)." (Emphasis added)

At the invitation of the District Court, all of the five states participated in the case as *amici curiae*. Without exception, they all stated in no uncertain terms, in both briefs and affidavits by their regulatory officers, that the collective formulation of intrastate rate proposals is an integral part of their chosen system of rate regulation, and that without it their ability to discharge their regulatory duties would be severely disrupted, if not made impossible. (R. 1655, 1674, 1676, 1680-81; R. 524, 622).

Moreover, the decision below, if left undisturbed, will have a devastating impact on the regulatory schemes of the states represented by Petitioner NARUC. The schemes described herein, including the provisions for the collective formulation of rate proposals, have been in effect in most states for at least three decades.[18] The decision below will require the dismantling of those schemes, and thus force state regulatory commissions to act upon rate applications on an individual basis for each of the hundreds of trucking companies doing business within their jurisdictions. The consequent burden in terms of time, effort and expense, will, as a practical matter, gut the ability of the states to discharge their duty to see to it that motor carrier rates applicable for intrastate transportation are just, reasonable and nondiscriminatory.

(b) The Decision Of The Fifth Circuit, Unit "B," Conflicts With The Principles Announced By This Court In Cases Involving The State Action Immunity From Federal Antitrust Laws

Since 1943 this Court has recognized that Congress did not intend the antitrust laws to deprive the states of their

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[18] Petitioner NARUC's *1981 Annual Report on Utility and Carrier Regulation* at 731 lists forty states with regulatory schemes of which the collective formulation of rates is an integral part. They are: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wisconsin. As of 1982, Wisconsin completely deregulated the rates of motor common carriers of property, and the Public Service Commission of West Virginia declared a two year moratorium on collective rate formulation.

sovereign power to regulate intrastate commerce as they see fit. The decision in *Parker* v. *Brown*[19] establishing antitrust immunity for state regulatory programs "is grounded in our federal structure. 'In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.' "[20] In short, the basic *Parker* proposition is that, while Congress has the power to preempt state economic regulation, an intent to do so will not be inferred absent clear evidence. Applying that proposition here, it is clear that the decision below necessarily infers that the Sherman Act condemns intrastate activities which are the same as the interstate activities Congress expressly authorized and immunized under the Interstate Commerce Act.

The Interstate Commerce Act authorizes, but does not compel, motor common carriers operating in interstate commerce to engage in the collective formulation of rates pursuant to agreements filed with and approved by the Interstate Commerce Commission. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b). The Act reserves to the states the power "to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b)(1).

In the five states involved in this proceeding and most other states, the collective formulation of rate proposals

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[19] 317 U.S. 341 (1943).

[20] California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (quoting *Parker* v. *Brown*, 317 U.S. at 351).

is authorized, but not compelled, by statute or administrative rule or policy. A number of states have adopted statutes which authorize the collective formulation of rate proposals and immunize that activity from their antitrust laws in language that is virtually identical to former Section 5a of the Interstate Commerce Act, former 49 U.S.C. 5b. North Carolina has such a statute and Tennessee has such a rule. Georgia, which has no state antitrust law, also authorizes by statute collective rate formulation. The various state provisions relating to collective formulation of rate proposals are designed to parallel and complement the federal provisions relating to collective rate formulation. Hence, it is plainly untenable to infer, as the Court below did, that Congress intended to preempt state law designed to effectuate in intrastate commerce the same policies that the federal law is designed to effectuate in interstate commerce. As Judge Clark said in his dissent, the majority opinion "completely ignores the Interstate Commerce Act, public policy, history and fairness." As he pointed out, the holding of the majority leads to the following anomalous result:

> Southern Motor Carriers Rate Conference, Inc., may file with the Interstate Commerce Commission rates for the carriage of carpeting from Rome, Georgia to Nashville, Tennessee. That same Conference may perform the identical function for the intrastate carriage of carpeting from Rome to Macon, Georgia, approximately the same distance. This has been done for three decades prior to the filing of this action in 1976. It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce.[21]

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[21] Appendix D at 93a (Clark, J., dissenting).

In *Parker*, the State Agricultural Prorate Advisory Act authorized private raisin growers to jointly propose and petition the State Agricultural Prorate Advisory Commission to approve a marketing program for the raisin crop. The Court held that an approved program was immune from the antitrust laws:

> It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.[22]

Thus, the principle of state action immunity from antitrust laws was established in a case in which, as here, the formulation and proposal of the program to state authorities was the voluntary collective action of private persons. Indeed, *Parker* stands for the proposition that where the state authorizes private parties to act jointly as an integral part of a state regulatory program, and where the state not only engages in careful oversight of such acts but retains final responsibility to approve or disapprove the conduct, the approved action constitutes state action which is immune from antitrust scrutiny.

This analysis of *Parker* is strongly supported by this Court's recent decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*[23] In *Midcal*, a California statute required all wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the state. Sales of wine at prices other

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[22] *Parker* v. *Brown*, 317 U.S. at 352.

[23] 445 U.S. 97 (1980).

than those established in the fair trade contracts or price schedules were prohibited. The state retained no responsibility or authority to review the contracts or schedules filed in compliance with the statute. In reviewing the statute, the *Midcal* Court set out two guiding principles for application of the *Parker* state action doctrine:

> First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.[24]

Although finding the first prong satisfied, this Court held that the statute in *Midcal* failed to meet the second prong of this standard because:

> The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of the fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program.[25]

Despite this Court's clear articulation of the standard to be applied in state action cases, the Fifth Circuit held that a "clearly articulated and affirmatively expressed" state policy is not sufficient to constitute the basis of a state action defense by a private defendant unless the state compels, rather than authorizes, the private party to act. The court held that:

> In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to

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[24] 445 U.S. at 105.

[25] Id. at 105-06.

the private party to carry out that policy or not as he sees fit.[26]

The majority ignores several practical points in reaching this conclusion. First, in contrast to *Midcal*, the private parties merely propose a rate schedule. They have *no* authority to make rates effective until the state regulatory commissions determine that they are lawful under the standards of their regulatory statutes. Thus, the private parties' initiative here, like the private parties' initiative in *Parker*, can be carried out only if the state reviews it and approves it. Second, the majority fails to recognize that by meeting the extensive oversight prong of *Midcal*, the state retains control of its policies. Indeed, there was no dispute in this case regarding the fact that "each state actively supervises the collective ratemaking process . . . ."[27]

The Fifth Circuit expressly declined, in the absence of compulsion,[28] to apply *Midcal* and consider whether the state policies embodied in the statutes authorizing collective rate proposals "were sufficiently clearly articulated

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[26] United States v. Southern Motor Carriers Rate Conference, Inc., Appendix D at 74a.

[27] Appendix D at 73a.

[28] It is interesting to note that the majority defines "compulsion" as not necessarily excluding action taken at the behest of a private party which petitions the state. "Still, once a state has adopted some policy, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy." Appendix D at 68a n.6. In this sense, compulsion is present here since the members of Petitioners SMCRC and NCMCA who are party to a collectively formulated rate proposal are compelled to charge the rates approved by the state regulatory bodies, regardless of whether the rates are the same as those proposed.

and affirmatively expressed for the state action exception to apply."[29] So sharply does this holding conflict with *Midcal* that Judge Hill, in dissent, was prompted to observe:

> The majority view that the Supreme Court could not possibly have meant what it said in . . . *Midcal* . . . seems presumptuous at worst, and unsound policy as it pertains to the facts of this case at best. The *Midcal* test is clear and explicit. It should not be ignored simply because a different conclusion can be reached by reexamining the same line of cases already analyzed by the Supreme Court.[30]

In addition to its reliance on the notion that *Midcal* incorporates the compulsion requirement discussed in earlier state action cases[31], the majority sought to distinguish *Midcal* by suggesting that the "case had nothing to do with the applicability of a state action defense to a private party."[32] The court apparently had reference to the fact that the state regulatory commission, rather than the private party being regulated, was named as the defendant. This distinction elevates form over substance in that it leaves in the hands of plaintiffs the power to determine the applicability of federal antitrust laws. Indeed, the Fifth Circuit's decision leads to the conclusion that *Parker* would have been decided differently had the defendants been raisin growers, since there was no compulsion for the growers to file a petition for a joint market-

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[29] Appendix D at 65a.

[30] *Id.* at 81a (Hill, J., dissenting).

[31] The majority first reviewed *Parker*, 317 U.S. 341, and then went on to find the origin of the compulsion requirement in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The court also looked for support to Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

[32] Appendix D at 74a.

ing plan.[33] Petitioners submit that the conflict between the holding of the Fifth Circuit, Unit "B," and this Court's holdings in *Parker* and *Midcal* could not be more direct.

(c) The Decision Of The Fifth Circuit, Unit "B," Conflicts Directly With Decisions Of The Ninth And District Of Columbia Circuits And Conflicts In Principle With A Decision Of The Seventh Circuit.

As detailed in subsection (a), *supra*, the Fifth Circuit has held[34] that compulsion is an absolute prerequisite to application of the two-pronged state action test stated in *Midcal* when the defendants are private parties. In direct conflict with this holding is the decision of the Ninth Circuit in *Turf Paradise, Inc.* v. *Arizona Downs*.[35] In *Turf Paradise*, which involved an antitrust claim filed by a private race track owner and operator against another private race track operator, the Ninth Circuit found that compulsion, rather than being a prerequisite to application of the *Midcal* test, was subsumed within the two

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[33] The express concern for federalism stated in *Parker*, 317 U.S. at 351, surely could not have had so narrow a basis. "[I]f the federal government or a private litigant could have enforced the antitrust laws against the raisin producers, effectuation of state policy would have been thwarted just as if the state action immunity were never granted." Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711, 724 (D.D.C. 1979) *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). *See also* Appendix D at 83a (Hill, J., dissenting) (stating that a distinction based on the identity of the defendant "would have proven unreasonable and inconsistent with the federalism concerns" expressed in Parker).

[34] See *supra* note 7 and accompanying text.

[35] 670 F.2d 813 (9th Cir. 1982), *cert. denied*, 102 S.Ct. 2308 (1982).

elements of the test. In sharp contrast to the Fifth Circuit, the Ninth Circuit found that:

> *Goldfarb* does not preclude a finding of state action immunity merely because of the presence of some private decision making pursuant to a clearly articulated state policy that is actively supervised by a state entity even though the supervision does not rise to the level of compulsion.[36]

The Fifth Circuit's conflict with the District of Columbia Circuit is just as direct as its conflict with the Ninth Circuit. In *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*,[37] the District of Columbia Circuit affirmed *per curiam* the district court's decision granting summary judgment to state and private defendants accused of engaging in a conspiracy in restraint of maritime transportation. After holding that the state defendants were immune from antitrust liability, the district court stated:

> Although there has been some judicial uncertainty regarding the reach of the *Parker* doctrine, it seems clear that a majority of the present Supreme Court believes that *Parker* is equally applicable to suits against private parties whose actions are compelled *or regulated* by the state.[38]

Moreover, the court held that the state action defense was not lost by virtue of the fact that the private defendants had voluntarily lobbied and advised the Puerto Rico legislature regarding the establishment of the government's maritime transportation system. After distin-

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[36] 670 F.2d at 823 n.8.

[37] 475 F. Supp. 711 (D.D.C. 1979), *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

[38] 475 F. Supp. at 723 (emphasis added).

guishing *Goldfarb* and *Cantor* as involving "neither adequate supervision nor state intent to displace antitrust enforcement,"[39] the court noted that *Parker* itself involved voluntary initiation by private parties of the relevant state processes.[40]

Finally, a compulsion requirement was rejected by the Seventh Circuit in *Town of Hallie* v. *City of Eau Claire*.[41] Although the precise holding of *Hallie* involved solely a municipal defendant, the court engaged in a careful analysis of *Midcal's* active supervision requirement and correctly concluded that it "ensures that the private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake."[42] This distinction made by the Seventh Circuit is crucial to understanding the error made by the Fifth Circuit, in the conflicting decision below. The Fifth Circuit was concerned with private party abuse of state power.[43] Unlike the Seventh Circuit, however, the Fifth Circuit failed to recognize that the purposes served by a compulsion requirement are effectively embodied in the active state supervision requirement of *Midcal*. For this reason, the court erroneously believed compulsion was a "threshold test" for state action immunity.[44]

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[39] *Id.* at 724-25.

[40] See *supra* note 3 and accompanying text.

[41] 700 F.2d 376, 381 (7th Cir. 1983).

[42] *Id.* at 384.

[43] See *supra* note 7 and accompanying text.

[44] Appendix D at 67a.

(d) The Decision Of The Fifth Circuit, Unit "B," Is Contrary To The Principles Announced By This Court As Embodied In The *Noerr-Pennington* Doctrine

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,[45] this Court unanimously held that collective action by railroads seeking state legislation favorable to the railroads and adverse to motor carriers was exempt from antitrust attack, holding that: "No violation of the [Sherman] act can be predicated upon mere attempts to influence the passage or enforcement of laws."[46] The *Noerr* Court further reasoned:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from *associating together* in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.[47]

This reasoning was reiterated by the Court four years later in *United Mine Workers* v. *Pennington*.[48] In *Pennington*, large coal operators and unions had agreed to seek regulatory action from the Secretary of Labor which would have been beneficial to them but harmful to small, non-union coal operators. The Court held that *Noerr* extended to efforts to influence the executive branch:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.[49]

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[45] 365 U.S. 127 (1961).

[46] *Id.* at 135.

[47] *Id.* (emphasis added).

[48] 381 U.S. 657 (1965).

[49] *Id.* at 670.

Subsequently, the Court held in *California Motor Transport Co.* v. *Trucking Unlimited*[50] that the protection of *Noerr-Pennington* extended to efforts to "use the channels and procedures of state and federal agencies and courts".[51]

Thus, this Court's pronouncements on the *Noerr-Pennington* doctrine make it clear that it is protected activity to attempt to influence any branch or agency of government and to associate together for that purpose. In direct conflict with these principles is the holding of the Fifth Circuit panel that *Noerr-Pennington* is inapplicable to the collective formulation of a rate proposal to a state regulatory agency.[52] The Fifth Circuit, in so doing, adopted in part the rationale of the district court on this point:

> The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.
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> This case is not technically one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. The parties have cited no cases in which courts

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[50] 404 U.S. 508 (1972).

[51] *Id.* at 510-11.

[52] *U.S.* v. *Southern Motor Carriers Rate Conference*, 672 F.2d 469, 476-77 (5th Cir. Unit "B") *rehearing en banc*, Appendix D (5th Cir. Unit "B").

> have invoked *Noerr-Pennington* to immunize price fixing among competitors.[53]

The Fifth Circuit panel acknowledges Respondent's recognition of the applicability of *Noerr-Pennington* to the act of presenting rate proposals to the state regulatory commissions. Nonetheless, the court seeks to separate preparatory conduct which is necessary and incidental to presentation of the proposals. However, to hold, as the Fifth Circuit does here, that collective rate proposals may be submitted to state regulatory agencies, but may not be formulated, reduces *Noerr-Pennington* to a meaningless shell. If Petitioners have a right to collectively ask the state commissions to approve rates, they must have the ancillary right to collectively decide what rates they want the commissions to approve. Moreover, to say, as the Fifth Circuit does here, that Petitioners may seek legislative or regulatory approval of collective ratemaking procedures, but may not formulate and seek approval of rates under those procedures, makes Petitioners' First Amendment right to collectively petition the government depend on what they ask the government to do. Obviously, such a proposition is untenable.

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[53] 672 F.2d at 477 (quoting *U.S.* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 484-85 (N.D. Ga. 1979).

CONCLUSION

For all of the reasons set forth herein, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, Unit "B".

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT,
N.D. GEORGIA,
ATLANTA DIVISION
MARCH 20, 1979.

Civ. A. No. 76-1909A.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., Motor Carriers Traffic Association, Inc., North Carolina Motor Carriers Assoc., Inc., National Association of Regulatory Utility Commissioners, *Defendants*.

ORDER

RICHARD C. FREEMAN, District Judge.

On November 17, 1976 the United States filed a complaint under Section 4 of the Sherman Act, 15 U.S.C. § 4,[1] to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[2] The three rate bureau defendants, Southern

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[1] Section 4 of the Sherman Act, 15 U.S.C. § 4, provides in pertinent part:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

[2] Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Motor Carriers Rate Conference, Inc. ("SMCRC"), Motor Carriers Traffic Association, Inc. ("MTCA"), and North Carolina Motor Carriers Association, Inc. ("NCMCA"), represent common carriers before the regulatory commissions of the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. On behalf of their members, the defendants publish tariffs containing proposed rates for intrastate for-hire transportation of general commodities. The complaint alleges that the defendants and their co-conspirators have engaged in a continuing conspiracy to fix these rates within the five subject states. The parties completed discovery following the court's ruling, on July 4, 1977, on the defendants' motions to dismiss the complaint and the plaintiff's motion to strike certain affirmative defenses. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 439 F.Supp. 29 (N.D.Ga. 1977). As a part of that order, we invited the Attorneys General of the States of Alabama, Georgia, Mississippi, Tennessee and North Carolina "to participate in the instant action by filing briefs, memoranda, or evidence which may be a critical aid in the ultimate resolution of the issues presented. . . ." *Id.* at 52. The action is presently before the court on the parties' cross-motions for summary judgment, Rule 56, Fed.R.Civ.P. For the reasons set forth below, we GRANT the government's motion for summary judgment and DENY the summary judgment motions filed by the defendants.

Discovery in this action has led to the development of a substantial record. While the parties vigorously dispute the significance of the facts in the record, they do not dispute the facts themselves, and have filed extensive stipulations of fact. The statement of the case which follows will review first, the regulatory schemes in the five subject states; second, the operations of the defendants in formulating and publishing intrastate rates before the state commissions; and finally, the procedures followed by the commissions in reviewing the proposed rates. The regulatory schemes of the various states differ somewhat, and we will survey each separately. As the rate formulation practices are similar among the defendant

conferences, and as the review mechanisms are similar among the commissions, we will describe these by reference to the North Carolina example. To the extent that there is a dispute among the parties, we will of course view the facts in a light most favorable to the defendants. *See Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

THE STATE REGULATORY SCHEMES

Alabama—Under Alabama law, all nonexempted motor carriers are subject "to control, supervision and regulation by the [Alabama Public Service] Commission." Title 48, Ala.Code § 301(3). That authority includes regulation of intrastate commerce "except insofar as the same may be in conflict with the provisions of the constitution of the United States and the acts of congress" in force in 1940 or thereafter enacted. Title 48, Ala.Code § 301(4). The powers and duties of the Alabama Public Service Commissions are set forth in Title 48, Ala.Code § 301(5), and include:

> 1. [The duty] [t]o regulate common carriers by motor vehicle as provided in this article and to that end the commission may establish reasonable rules and requirements with respect to adequate service, transportation of passengers, baggage, freight and express, . . .
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> . . . . .
>
> 4. To supervise and regulate common carrier in all matters affecting the relationship between such common carriers and the traveling and shipping public.
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> . . .

Alabama Code § 301(17) further places concomitant duties on the common carriers with respect to rates, fares, and charges, including, *inter alia:*

> B. . . . the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment and facilities for the intrastate transportation of property in the State of Alabama; to establish, observe

> and enforce just and reasonable rates, charges and classifications, and just and reasonable regulations and practices relating thereto . . . [for] all . . . matters relating to or connected with the intrastate transportation of property in the State of Alabama.
>
> C. Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges and classifications with other such carriers or with common carriers by railroad or express or water; . . . In case of such joint rates, fares or charges, it shall be the duty of the carrier parties thereto to establish just and reasonable regulations and practices. . . .[3]

These provisions illustrate a common pattern among the subject states: motor carriers are required to cooperate for the limited purpose of establishing joint rates, i.e., rates covering a shipment in which one carrier operates over only part of the route and another carrier serves the remainder. In this fashion, a shipper is able to obtain a single price for a shipment involving more than one carrier. On the other hand, Alabama does not require that two carriers providing identical service along the *same* route charge identical prices, or confer as to the prices each will charge.

Georgia—Motor common carriers came under the jurisdiction of the Georgia Public Service Commission in 1929. Pursuant to the requirements of the Georgia statutes all common carriers must obtain certificates of public convenience and necessity. The Public Service Commission has the sole authority to prescribe just and reasonable rates, fares and charges. The Commission maintains a staff of seven professionals and additional clerical personnel to analyze motor common carrier

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[3] Interstate Commerce Tariff Circular No. 3 provides, "The term joint rate means a rate that applies over the lines or routes of two or more carriers. . . ." Horace F. Hartley, Director of Transportation Rates and Services, Georgia Public Service Commission, described a joint rate as a rate derived by two or more carriers to cover a single interlining movement of freight in which those carriers participate. Deposition of Horace F. Hartley at 61-62.

costs of Class "A" carriers.[4] As in Alabama, Georgia Law sanctions cooperation between motor carriers in establishing through routes at prescribed joint rates. The statutory framework requires that the Georgia Public Service Commission

> prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, and the tariffs therefor shall be in such form, and shall be filed and published in such manner and on such notice as the commission may prescribe, and shall be subject to change on such notice and in such manner as the commission may prescribe.

Ga.Code Ann. § 68-613. Rule 10(a), General Motor Carrier Rules and Regulations of the Georgia Public Service Commission provides that

> Motor carriers of property operating under certificates Class 'A' will be required to receive property destined to stations located on routes of other Class 'A' carriers, and to interchange such property at rates prescribed by this Commission, with such connecting carriers.

Mississippi—The regulation of motor common carriers operating in intrastate commerce within Mississippi was vested in the Mississippi Public Service Commission by the Motor Carrier Regulatory Act of 1938. The public policy expressed by the 1938 Act substantially paraphrases the National Transportation Policy, *see* 49 U.S.C. preceding §§ 1, 301, 901 and 1001, and provides that the purpose of the regulation of motor common carriers is to ensure "reasonable charges . . . without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices. . . ."

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[4] Rule 2 of the Rules and Regulations defines Class A carriers as:

> common carriers of passengers and/or property operating over a fixed route or between fixed termini in intrastate and interstate commerce, under Certificates of Public Convenience and Necessity.

Mississippi law comes the closest to requiring uniform rates to be charged by competing carriers serving the same route. Rule 39d(4) of the Mississippi Public Service Commission provides:

> Where two or more freight rates are published to apply on certain articles or commodities between points in Mississippi, by the same motor carriers, or by different motor carriers, the lowest rate, whether class or commodity, shall be applied over all motor carriers accepting and transporting freight between such points; and in no instance should a rate be published or applied which exceeds the aggregate of published intermediate rate, class or commodity, or class and commodity, unless and until proof of the reasonableness of such rate is submitted to and approved by the Commission, provided that in the initial filing penalties will not apply for violation of this rule until such is called to the attention of the carriers and reasonable opportunity is given for adjustment or justification.

Even here, however, a carrier retains the right to file an independent rate, which may be lower than class rates in a tariff. *See* Deposition of David Screws at 73-75. A Transportation Rate Specialist for the Mississippi Commission has described the uniformity generally occurring in Mississippi intrastate rates as "unwritten law." *Id.* at 71.

North Carolina—Since 1947 the North Carolina Utilities Commission has been charged with the exclusive authority to make rates for all motor common carriers subject to its jurisidiction.

House bill 417 of the North Carolina Legislature, entitled "An Act to provide for Uniform and Joint Rates Among Motor Carriers of the Same Class" contains provisions similar to those in the federal Motor Carrier Act. The bill, which was enacted by the state legislature, N.C.Gen.Stat. § 62-152.1, allows two or more carriers to enter into an agreement relating to "rates, fares, classifications, divisions, allowances or charges . . . [f]or the purpose of achieving a stable rate structure." The law further provides that it "shall be the policy of [the State of North Carolina] to fix uniform rates for the same

or similar services by carriers of the same class." As in Section 5a of the Motor Carrier Act, the parties to the agreement may apply to the state public service commission for approval of the agreement. The parties to any agreement so approved are relieved from the operation of the state antitrust laws in the making and carrying out of the agreement.

Tennessee—Under Tennessee law, the Tennessee Public Service Commission fixes the rates which motor carriers may charge. Although any carrier is permitted to reduce its rates without prior authorization of the Commission, no general increase is permitted until hearings have been held and the approval of the Commission secured. Rule .40 of Chapter 1220-2-1 of the Tennessee Public Service Commission, Division of Motor Carriers, adopts Section 5a of the Interstate Commerce Act, 49 U.C.S. § 5b, providing:

> The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, division, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation, or establishment thereof as set forth by the Interstate Commerce Commission in Section 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; providing, however, that the final determination on any rates, fares, classification, divisions, allowances, charges, rules and regulations or procedures shall be left in its final determination to the Tennessee Public Service Commission.

THE ROLE OF THE RATE CONFERENCES

Each of the three defendant conferences operates in the state of North Carolina. NCMCA's procedures are typical of all three. Its rate proposals to the North Carolina Utilities Commission are formulated in NCMCA's rate committee and then submitted to the Commission for approval, disapproval, or modification. Each member of NCMCA is entitled to have a representative on the rate committee; when the rate commit-

tee meets to consider rate proposals, shippers are invited to be and are present during the discussion of rate proposals. Approximately 300 shippers subscribe to the NCMCA tariff, and therefore receive notice of all meetings of the NCMCA rate committee. Many shippers send their professional rate specialists to the rate committee meetings. After a discussion of a rate proposal by carriers and shippers, the shippers and their rate specialists leave and the members of the rate committee vote on the proposal by secret ballot. Members of NCMCA are not bound by the action of the rate committee, but instead have the right to announce and file an independent rate proposal with the Commission.

Where general rate increase proposals are involved, the rate committee of NCMCA may meet with members of the two other North Carolina rate bureaus, SMCRC and MCTA. On some occasions NCMCA gives its members notice of the meeting dates of the general commodity rate committees of SMCRC and MCTA. Shippers are also invited to and do attend the meetings, and many shippers send their rate specialists. The defendants claim the joint meetings are encouraged by the shippers because they can attend just one rate committee meeting on a proposed general rate increase rather than three. After a discussion of the proposed increase by shippers and carriers, the shippers and their rate specialists leave and the members of the NCMCA rate committee vote by secret ballot on a rate proposal separately from the rate committees of SMCRC and MCTA.

Where general rate increase proposals are involved, the rate bureaus may submit the same proposals to the Commission with the same effective date, but each conference makes a separate decision on the proposal, and submits its proposal to the Commission separately. When a general rate increase is proposed to the Commission for its action, NCMCA may avail itself of SMCRC personnel to prepare traffic studies to be presented at the hearing, and these studies are sometimes presented by the three bureaus at a Commission hearing.

REGULATORY PROCEDURE

Procedures within each commission for review of published rates tend to be uniform. A published rate goes into effect unless set down for a hearing by the commission. The commissions consistently require hearings, however, and an order scheduling a hearing automatically suspends a proposed tariff.

In North Carolina, no general rate increase has been granted without a hearing before the Commission, with the exception of an emergency fuel surcharge allowed on an interim basis during the Arab oil embargo in 1974. Prior to the hearing, the North Carolina Commission's Public Staff undertakes a separate, independent study into the necessity of the proposed increase. The Public Staff will require the carriers to furnish freight bills and information concerning other expenses so that it can arrive at an operating ratio to submit as evidence at the hearing. In addition, the Public Staff undertakes on-site review and verification of motor carrier books and records in order to gather evidence to be submitted at the hearing. After its investigation, the Public Staff through sworn testimony at the hearing will make a recommendation as to a proposed rate increase.

Where a general rate increase proposal is involved, the matter is heard by the Commission en banc or by a panel of three Commissioners. The hearing is open to the public, and evidence may be submitted by any interested party, including the applicant, any intervenor, the Public Staff and the utility division of the Attorney General's office in North Carolina. At a hearing on a general rate increase, NCMCA and MCTA may rely on a rate justification statement prepared for them by SMCRC. The statement may contain information about rates in other cases.

The record, in sum, reveals a relationship between the defendants and the regulatory processes in which they participate that ranges from friendly to intimate. The states, as amici, have stressed the integral role of the conferences, and it is clear that, at the least, they are a part of daily regulatory life.

Amidst the many ties between the states and the conferences, however, two important factors are not present in any of the subject states. First, no state requires that all rates among competing carriers for identical service by uniform.[5] Second, no state requires, either by statute or regulation, or other

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[5] Had the defendants argued, or had they established, that state law required all prices for identical services along the same route be uniform, this would be a very different case. We do not doubt that the five subject states are capable of entirely displacing the marketplace mechanism of setting prices with a system in which price competition plays no part. The states might have determined that their businesses and consumers would be best protected by a regulatory rate-making process that mandates uniform prices for a given service, typically based on a "just and reasonable" standard, than by the marketplace. Consequently, they could have replaced price competition with a state-mandated price-setting scheme in which intrastate common carriers would compete, but only by means other than price competition.

The nature of the carrier's participation in such a system regulated by legislative or administrative mandate would seem to be entirely different from the nature of its role in the marketplace. Where price competition is permitted (and protected), the individual participant attempts to lower prices so as to attract business from his competitors. Once prices are regulated, however, his participation in the price-setting "system" changes significantly, for his interest will usually lie in raising prices instead of lowering them. By charging a lower price he will ordinarily not gain an advantage over his competitors, who must always charge an identical price. Moreover, he will act in essentially the same manner regardless of whether he is alone or combining with other carriers, by attempting to convince the regulatory body to accept higher tariffs.

Were prices made uniform by state mandate, we would question the applicability of an antitrust theory designed to stimulate price competition. Indeed it would be doubtful that such practices as are engaged in by the defendant conferences could correctly be said to be "in restraint of trade," within the meaning of Section 1 of the Sherman Act. The parties have made it clear, however, that each of the subject states guarantees to individual carriers the right to charge

express legislative or administrative mandate, that rates proposed by carriers be formulated or published by rate conferences. These facts, particularly the second, provide the primary basis for our resolution of the issues before the court.

Based on the existing record, the parties are in agreement that the action is ripe for summary judgment. We concur, not merely because of the cross-motions, but because we agree that the existing disputes among the parties and amici are ones of characterization and law, not of fact. Extensive briefing of the action has narrowed the issues to three: first, whether the defendants' activities are immunized from antitrust liability by the "state action" doctrine; second, whether the defendants are protected by the "Noerr-Pennington" doctrine; and finally, whether their practices, if unprotected, are antitrust violations as to which the court should now enter summary judgment. We resolve each of these in the government's favor and conclude that the defendants are in violation of the Sherman Act.

STATE ACTION IMMUNITY

The pivotal issue in this action is whether the challenged practice of collective rate publication falls within the category of private activities that are immune from the antitrust laws under the "state action" doctrine. This question has received by far the greatest attention from the parties in their extensive briefing of the cross-motions for summary judgment. Besides

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rates lower than their competitors' rates for identical service. *E.g.*, Statement of Material Facts, submitted in support of SMCRC's motion for summary judgment, filed Aug. 1, 1978, at 3, 4. By preserving the carriers' right of independent action, the subject states have permitted, to an admittedly limited degree, price competition. Within the range of rates that will be approved as just and reasonable, *see United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 506, 55 S.Ct. 462, 79 L.Ed. 1023 (1935), the states do not impede the ability of the carriers to set prices competitively.

being central to the case, the issue is, we think, a particularly difficult one. Application of the state action doctrine may call for extended inquiry and analysis of a state's regulatory statutes and programs; of the mix of public and private participation in administrative decisions; and even, perhaps, of the economic theory underlying a legislative scheme. *See* L. Sullivan, *Handbook of the Law of Antitrust* 738 (1977). To an extent, our resolution of the question obviates the need for such extraordinary probing, for we will conclude that the absence of actual compulsion renders the state action doctrine unavailable to each of the defendants. Nevertheless, any venture into the twilight zone dividing the realms of uncontested state and federal sovereignty requires that the traveller proceed with extraordinary caution.

The state action doctrine begins with *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). California, by statute, had established a scheme whose admitted purpose was to maintain prices and restrict competition among raisin growers. The growers would develop, in combination, marketing and pricing programs which they would submit to a state commission for approval. The commission would sanction a program where it found, after a hearing, that the program would prevent agricultural waste without allowing excessive profits to the growers, and where the program was approved upon referendum by a requisite number of growers.

A raisin grower brought suit in federal court challenging the program, *inter alia*, as invalid under the Sherman Act. Chief Justice Stone rejected the challenge, holding that Congress, in enacting the Sherman Act, did not intend to prohibit state action regulating ecnonomic activity:

> Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone

> is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions.
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

317 U.S. at 352, 63 S.Ct. at 214 (citations omitted).

Unresolved by the decision in *Parker*—and perhaps unresolved to this day[6]—is the question whether the doctrine announced in that case would protect not only the state itself, but private parties acting under the state mandate. Read most conservatively, the quoted passage holds only that the state's immunity as a sovereign is not undermined by private participation in the state program. Yet the language also hints that

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[6] *See Bates* v. *State Bar of Arizona*, 433 U.S. 350, 361 n.13, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), noting that only four justices joined in that part of *Cantor* v. *Detroit Edison*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), holding *Parker* inapplicable to private defendants. In *Cantor*, however, Justice Stevens went on to suggest circumstances under which merely private conduct required by state law would still be exempt from the Sherman Act. Since his discussion of those circumstances was adopted by a majority of the court, the question of whether private parties are protected under *Parker* is largely mooted: a private party claiming "state action" exemption must always satisfy the stricter *Cantor* requirements.

the state may, in the exercise of its sovereignty, shelter individuals from antitrust liability, and that this immunity may in turn survive even where the private party has participated in the state's actions. Thus, *Parker* offered a basis for believing first, that a private individual acting at the command of a state sovereign could avoid the effect of federal antitrust laws, and second, that the individual's participation in bringing about the state action would not threaten his immunity thereunder.

Neither of these notions was significantly shaken in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). The Supreme Court held that enforcement of a price-fixing schedule by state and county bars was not exempt under *Parker* v. *Brown* because the activity was not compelled by the state:

> The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign.

421 U.S. at 790, 95 S.Ct. at 2015. Thus, the court rejected the respondents' assertion that because their actions were "prompted" by the state, no antitrust liability could attach. Moreover, the court suggested that compulsion would not be the sole criterion, but that before the *Parker* doctrine afforded him safe conduct through the forbidden territory of anticompetitive practices, a private party might have to make a yet-unspecified additional showing:

> Here, we need not inquire further into the state-action question because it cannot fairly be said that the state of Virginia through its Supreme Court Rules required the anti-competitive activities of either respondent.

Precisely what would have to be shown in such a case was the subject of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). Detroit Edison, an investor-owned public utility, operated under a regulatory scheme similar to those involved in this action. Detroit Edison would file tariffs for the sale of electric power with the Michigan Public Service Commission, which was empowered by state statute

"to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." 428 U.S. at 584, 96 S.Ct. at 3114. The Commission would approve, modify, or reject the tariffs as filed. While Detroit Edison was free to propose modifications at any time, Michigan law forbade deviation from any tariff actually in force.

The Commission had approved one of Detroit Edison's tariffs containing a program of free distribution of standard-size light bulbs to customers. The petitioner, a retail druggist selling light bulbs, attacked the scheme as an illegal tying arrangement. The petitioner claimed the scheme allowed Detroit Edison to use its monopoly status in the electric power market to increase its power and reduce competition in the light bulb market. Detroit Edison answered that the program was protected under *Parker* and *Goldfarb*, because it was compelled by the state acting as sovereign.

As augured in *Goldfarb*, the court determined that the respondent's showing of formal compulsion was not enough. Justice Stevens' opinion for the court analyzed the state action in two sections. First, he held that *Parker* v. *Brown* only conferred antitrust immunity on the state agents acting in their official capacity. 428 U.S. at 590-91, 96 S.Ct. 3110. The language of *Parker*, Justice Stevens reasoned, was carefully chosen so as to exclude mere private parties claiming to be acting under compulsion of state law. 428 U.S. at 590-92 & n.24, 96 S.Ct. 3110.

Only three other justices joined in the portion of Justice Stevens' opinion holding *Parker* inapplicable to the Cantor facts. 428 U.S. at 581, 96 S.Ct. 3110. Backed by a majority of the court, however, Justice Stevens went on to suggest two instances where private conduct required by state law might still be exempt from the Sherman Act. First, Justice Stevens suggested that "it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command." 428 U.S. at 592, 96 S.Ct. at 3118. This

"unfairness" theory recognizes the predicament of the citizen caught between conflicting demands of independent sovereigns, but only where the conflict is real. Justice Stevens refused to find unfairness in the facts before him because the predicament with which the respondent might claim to be faced was largely illusory. The respondent could not claim to have "done nothing more than obey the command of [its] state sovereign," *id.*; Justice Stevens' perceptive analysis of the regulatory process revealed it to be "a blend of private and public decisionmaking" in which the element of participation in so significant as to render the notion of coercion inapplicable to a characterization of the individual's compliance. The tying arrangement had not merely been imposed upon the respondent by the state Commission. It was the respondent who conceived, developed, and proposed the program; who argued the program's merits before the Commission; and who chose not to exercise its ever-present right to petition the Commission for elimination of the program.

Justice Stevens also supposed that Congress did not intend to impose conflicting antitrust standards upon an area already pervasively regulated by the state. 428 U.S. at 595, 96 S.Ct. at 3119. Any private party seeking a defense under this "already regulated" theory, however, would necessarily face three obstacles:

> First, merely because certain conduct may be subject to both state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.

Id.

Each of these related considerations in part explained Justice Stevens' refusal to exempt the tie-in under the "already regulated" theory. Most significant was the fact that the Michigan regulatory scheme was not to any meaningful degree concerned with the sale of light bulbs. This peripheral market was an "essentially unregulated area:"

> The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired.

428 U.S. at 598, 96 S.Ct. at 3121.

The court's willingness in *Cantor* to probe the degree of state interest and involvement has led to the generally-approved supposition that the state action doctrine implies a "requirement that the state's regulatory interest be evidenced by active supervision and a clear statement of intent to regulate" the alleged activity. *See United States* v. *Southern Motor Carriers Rate Conference*, 439 F.Supp. 29, 41 (N.D.Ga. 1977), *quoting* 81 Harv.L.Rev. 1, 229-47 (1976). The defendants have striven to present the five subject regulatory processes in a light that best demonstrates that this standard has been more than satisfied. They have pointed to the close scrutiny with which they contend the state commissions review proposed rates and to the central function which collective ratemaking purportedly plays in the overall system of rate proposal and review. MCMCA also emphasizes North Carolina's "little section 5(a)," which announces a state policy approving of collective ratemaking and exempting the conference activities from the North Carolina antitrust laws.

The government, on the other hand, refuses to concede what it insists is the pivotal state action question. The government

insists that as private parties, none of the defendants may invoke the state action doctrine without first showing that its challenged activities are compelled by the states acting as sovereigns. Nothing in any case decided after *Goldfarb*, the government argues, modifies this basic requirement, and regardless of the virtual romance between the states and their ratemaking conferences, no state *requires* that rates be published collectively.

At the outset, we note that even under a test that does not include state compulsion, the defendants face an uphill battle. The Supreme Court held in *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 435-64, 65 S.Ct. 716, 89 L.Ed. 1051 (1945) that collective setting of interstate railroad rates was not exempt from the antitrust laws merely because the Interstate Commerce Commission held power to approve the rates. And in *Cantor*, 428 U.S. at 596, 96 S.Ct. at 2120, the Court reasoned, "Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws." Moreover, even though rate publication generally may be more central to the regulatory schemes here than light bulb sales were in *Cantor*, the *collective* aspect of rate publication might prove peripheral. We need not decide the question here, however, for we agree with the government that compulsion by the state acting as a sovereign remains, as expressed in *Goldfarb*, a threshold barrier to application of the state action doctrine.

The first reason why compulsion is necessary is that this is the precise principle for which *Goldfarb* stands. The *Goldfarb* court found that further inquiry into the state action question was pretermitted by an absence of state compulsion. This holding, at least as it applies to private defendants, has been untroubled by subsequent decisions.

The defendants rely principally on *Cantor* in arguing that the compulsion requirement is less than absolute. Yet compulsion was the very starting point of that case. After holding *Parker* inapplicable to activities of private parties, Justice

Stevens considered the availability of analogous state action principles to a private defendant:

> In this case we are asked to hold that private conduct *required* by state law is exempt from the Sherman Act. Two quite different reasons might support such a rule.

428 U.S. at 592, 96 S.Ct. at 3118 (emphasis supplied). The court went on to enunciate the "unfairness" and "already regulated" concepts that might support state action protection. The court premised its discussion, however, on the fact that the tie-in arrangement was "required," by state law.

The debate between the majority and dissenting opinions took place within the context of a private party's undertaking of state-mandated practices, and it is this context which gives meaning to the debate. Justice Stevens, writing for the court, and Justice Stewart, writing for the three dissenting justices, focused upon two related themes. The first was the extent to which courts might inquire beyond the formality of state compulsion. Justice Stewart found compulsion sufficient to invoke state action immunity anytime a state approved or established a practice, where the effect of approval was to proscribe subsequent deviation. The regulatory process, he reasoned, was a three-step affair in which the private party proposes, the state decides, and the private party complies. Proposal was protected by the First Amendment principles expressed in *Eastern Railroad Conference* v. *Noerr Motors*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). Compliance was protected by *Parker* and *Goldfarb*. 428 U.S. at 624, 96 S.Ct. 3110.

Justice Stevens answered that this analysis was simplistic, for it ignored the reality that regulatory decision making is typically a process in which public and private input are continuously combined. Formal compulsion by the state, he argued, ought not be given automatic deference by the courts where the compulsion also lacked substance.

The second, related, debate in *Cantor* centered on notions of federalism. Justice Stewart contended that *Goldfarb* compulsion was sufficient to bar federal incursion into the state realm:

> *Goldfarb* clarified *Parker* by holding that private conduct, if it is to come within the state-action exemption, must be not merely "prompted" but "compelled" by state action. Thus refined, the doctrine performs the salutary function of isolating those areas of state regulation where the State's sovereign interest is, by the State's own judgment, at its strongest, and limits the exemption to those areas.
>
> Beyond this the Court cannot go without disregarding the purpose of the Sherman Act not to disrupt state regulatory laws.

428 U.S. at 637-38, 96 S.Ct. at 3140 (footnotes omitted).

The majority conceived of a more forceful application of federal law. The "already regulated" theory of immunity, for instance, was only to be invoked where confrontation was unavoidable, and even then did not constitute a rule of automatic deference:

> First, merely because certain conduct may be subject both to state regulation and to federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's;
>
> . . .

428 U.S. at 595, S.Ct. at 3120.

Each of these questions is given meaning in the context of state compulsion of private activity. The first challenges the genuineness of the coercion. Such an inquiry would be unnecessary—as it was in *Goldfarb*—were there no coercion to judge. Similarly, the federalism debate derives its intensity from the circumstances of opposing *demands* from discrete sovereigns.

Thus, the *Goldfarb* inquiry is not discarded by *Cantor*. The court must begin with the threshold determination of whether

the defendants' acts are "compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015. Only where that milepost is reached may we test the extent of the state's involvement in the compelled activity.[7] In the case before the court, there is no such necessity; it is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states. Though informally ratified and even encouraged by the procedures and pronouncements of the various regulatory agencies and, to a limited degree, by the states' laws themselves, the practice is nowhere compelled.

The parties have not produced, and we have not found, a single case decided subsequent to *Goldfarb* in which activities not required by the state were held immune under the state action doctrine. *See New Motor Vehicle Board* v. *Fox*, ___ U.S. ___, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). Indeed, the subsequent cases have tended to reiterate the compulsion requirement. *E.g.*, *Bates*, 433 U.S. at 359, 97 S.Ct. 2691.[8]

A related strain of cases might suggest a less stringent test. In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S.

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[7] For an excellent presentation of the pertinent inquiry in such a case, *see Sullivan*, *supra*, § 238 at 738-39.

[8] A review of existing authority on the state action doctrine suggests the necessity of specifying the meaning we ascribe to the notion of compulsion by the state. Professors Areeda and Turner have argued that courts ought not require state "compulsion" of a private activity as a prerequisite to invocation of the state action defense. P. Areeda & Turner, I *Antitrust Law* § 215 (1977). Over-application of the *Cantor* principle that many regulatory decisions are industry-initiated, these observors fear, may lead courts to find antitrust liability in circumstances where, unlike *Cantor*, the challenged private practice lies at the heart of the regulatory scheme. Areeda and Turner cite the facts in *Parker* to illustrate a situation in which

389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Court examined the extent to which *Parker* immunity was available to a city operating a municipal electric utility. The Court concluded:

> [T]he *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.
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> . . .
>
> While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of

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industry participation in regulatory decision making should not render the state action defense unavailable.

Areeda and Turner, are employing a special definition of state "compulsion." They characterize both *Parker* and *Cantor* as cases in which there was not "compulsion," evidently based on the fact that the *impetus* for the state action came from the regulated entities.

The language of *Cantor*, and our discussion here, however, analyses compulsion differently. Justice Stevens specifically described the light bulb tie-in as "required." 428 U.S. at 592, 96 S.Ct. 3110. He then determined that such compelled activity might be protected under either an "unfairness" or an "already regulated" theory. In either case, the threshold compulsion that existed arose from the fact that state law *formally* required the tie-in by virtue of the Commission's having approved Detroit Edison's tariff: so long as there was no new filing, Detroit Edison had to continue the light bulb distribution program. It is only this minimal, formal, compulsion that we find to be a necessary element to a *Parker* defense.

> action complained of" [*City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976)].

435 U.S. at 413-415, 98 S.Ct. at 1137, 1138 (footnote omitted).[9]

City of Lafayette does announce a standard of state action immunity that protects activities "contemplated" by the state legislature, but confers this immunity only on state subdivisions. That a municipality should have to make a smaller showing than a private party is only natural, for the municipality is already a limited sovereign, exercising, to the extent conferred by the state, an array of governmental features and powers. The Court made this very point when it distinguished *Cantor*, pointing out that a municipality may claim to act "as an agent of the State." 435 U.S. at 411 n.40, 98 S.Ct. at 1135-36 n.40. Thus the standard governing the antitrust immunity accorded state subdivisions differs from, but does not modify, the rules applicable to a private party. *See also Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975).

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[9] Earlier in its opinion, the Court quoted, with apparent approval, the order of the Fifth Circuit:

> "A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in *Goldfarb*, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent. 532 F.2d, at 434-435 (footnotes omitted).

435 U.S. at 393-394, 98 S.Ct. at 1126-27.

Finally, we realize that state compulsion might not always be an absolutely immutable requirement. The case may arise in which a regulatory or legislative scheme, while not explicitly requiring a particular act, is structured so as to render the act indispensable to compliance with the scheme. In this sense an anticompetitive activity may be protected because it is impliedly or constructively compelled by the state. We think, however, that this argument is foreclosed to the present defendants by *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 98 L.Ed. 1051 (1945). That case held collective rate setting by railroads to be subject to the antitrust laws despite the regulation of railroad rates by the Interstate Commerce Commission. It is true that the cost-saving features of collective ratemaking, which obviate the need for each carrier to make an independent investigation into the economic factors affecting rates he should publish, may be more significant in the trucking industry. The defendants' memberships include many small businesses, which, unlike railroads, may be hard pressed to absorb the added expense incurred in making individual rate formulations. This, however, merely means that by imposing their respective regulatory systems upon the intrastate truckers, the subject states have increased the cost of doing business. The Sherman Act protects "competition, not competitors," *Brown Shoe, Inc.* v. *United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 82 L.Ed.2d 510 (1962), and the added fact that the state scheme adversely affects smaller shippers does not justify an antitrust exemption.

NOERR-PENNINGTON DOCTRINE

The defendants have devoted considerably less effort to advancing a *Noerr-Pennington* defense theory. The doctrine, briefly stated, holds that concerted action consisting solely of activities aimed at influencing public officials does not violate the Sherman Act.[10] The Supreme Court has expressly ex-

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[10] For a discussion by this court of the doctrine and its origins, see *United States* v. *Southern Motor Carriers Rate Conference*, 439 F.Supp. 29, 46-47 (N.D.Ga.1977). *See also Sullivan, supra*, § 238 at 740-43.

tended the doctrine to lobbying efforts before state administrative agencies. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The defendants argue that since all of their challenged activity is directed toward influencing the state commissions, no antitrust liability may attach.

The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

This case is not technically one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. *See Sullivan, supra*, § 238 at 740. The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors.

The First Amendment principles underlying *Noerr-Pennington* are nevertheless applicable by analogy. If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

The difficulty with this analysis is that it ignores the teaching of *Cantor*. Justice Stevens' characterization of the regulatory process as a blend of public and private decision making illustrates that the regulatory industry does not merely propose, but also decides. Even though the proposals require

state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decisionmaker.

This does not, of course, mean that *Noerr-Pennington* is inapplicable to rate making and related administrative activities. It does, however, suggest that a court may properly accord independent significance to the defendants' activities of rate formulation and proposal. First Amendment law has always recognized that even an activity which is itself communicative may nevertheless be penalized because of its non-speech aspects. *See, e.g., United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (draft card burning is conduct not protected by the First Amendment); *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) (civil rights demonstration on a sidewalk opposite a courthouse is "speech plus," entitled to a lesser degree of protection than pure speech); *Teamsters Local 695* v. *Vogt*, 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347 (1957) (the state may prohibit picketing directed at achieving a union shop in violation of state law). Here, we agree with the government that the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine.

THE SHERMAN ACT VIOLATION

In *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), the Supreme Court held that collective rate publication by railroads constituted price fixing illegal under the antitrust laws even though the published rates were reviewed and approved by the Interstate Commerce Commission:

> [T]he Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the antitrust laws. Thus a "zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago*,

> *M., St. P. & P.R. Co.*, 294 U.S. 499, 506, 55 S.Ct. 462, 465, 79 L.Ed. 1023. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ unlawful tactics. If the ratemaking function is freed from the unlawful restraints of the alleged conspiracy, the rates of the future will then be fixed in the manner envisioned by Congress when it enacted this legislation. Damage must be presumed to flow from a conspiracy to manipulate rates within that zone.

324 U.S. at 460-61, 65 S.Ct. at 728. Relying on *Pennsylvania Railroad*, the courts appear to have assumed that collective rate-making violates the Sherman Act. *See Pan American World Airways* v. *United States*, 371 U.S. 296, 305-06 & n.11, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963); *Marnell* v. *United Parcel Services of America, Inc.*, 260 F.Supp. 391, 404-05 (N.D.Cal.1966).

The *Pennsylvania Railroad* case leaves the defendants very little breathing room. They argue, however, that their activities do not violate the Sherman Act (1) because the states, rather than the defendants, determine the prices to be charged by intrastate carriers; and (2) because the defendants' activities, properly viewed under Rule of Reason analysis, do not unreasonably restrain trade.

Throughout their extensive briefing of this case, the parties have debated the correct characterization of the defendants' actions. The government contends that the defendants are responsible for fixing intrastate trucking rates, and that the state commissions furnish no more than a formal stamp of approval. The defendants insist that they only propose, and that the "fixing" of rates is performed exclusively by the commissions.

The cases establish a middle ground and have the effect of refuting the defendants' protestations of nonparticipation in regulatory decision making. As a consequence, the government is correct to describe collective rate publication as price "fixing:" this is precisely the language employed by Justice Douglas in the *Pennsylvania Railroad* decision. 324 U.S. at

460-61, 65 S.Ct. 716. Similarly, the state action cases have uniformly recognized that state participation in an anticompetitive scheme does not render the private party a non-actor. *See Cantor*, 428 U.S. at 592, 96 S.Ct. 3110; *Goldfarb*, 421 U.S. at 791 & n.21, 95 S.Ct. 2004.

Moreover, the practice of collective rate publication easily fits the classic description of a "naked price restraint." Since *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), it has been established law that price fixing among competitors is a *per se* violation of Section 1 of the Sherman Act. *See, e.g., Goldfarb; United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); *Hartford-Empire Co.* v. *United States*, 323, U.S. 386, 65 S.Ct. 373, 89 L.Ed. 322 (1945). Because the guiding principle behind all Sherman Act jurisprudence is the protection of competition, *see United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 577, 19 S.Ct. 25, 43 L.Ed. 259 (1898), any arrangement whose purpose or effect is to inhibit price competition is illegal. Such an arrangement need not be outright cartelization, so long as it brings about, or is intended to bring about, the "raising, depressing, fixing, pegging, or stabilizing" of prices. *Socony-Vacuum*, 310 U.S. at 223, 60 S.Ct. at 844.

The defendants' activities have precisely such an effect. The very function they serve is to coordinate the rates that their member carriers will charge. Within the "zone of reasonableness" in which, free from regulatory interference, market forces would otherwise determine price, the defendants have displaced competition with concerted pricing decisions. In so doing, they violate the Sherman Act at its most sensitive spot. The defendants' practices of collective rate coordination and publication are *per se* violations of Section 1, subject to injunction by this court. *See White Motor Co.* v. *United States*, 372 U.S. 253, 259-60, 83 S.Ct. 696, 9 L.Ed.2d 738 (1960) (summary judgment is appropriate in *per se* price fixing cases) (dictum).

See also First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).[11] We will therefore GRANT the government's motion for summary judgment, holding that the defendants have violated Section 1 of the Sherman Act.

RELIEF

The arguments by the defendants and *amici* intimate that the relief sought by the government will significantly interfere with the regulation of intrastate trucking in the subject states. We are of course hopeful that whatever transition is necessitated by this order be effected in the least disruptive manner possible. At the same time, it is apparent that the transition will inevitably cause difficulties, and that these must not stand in the way of swift compliance with the Sherman Act. The court will therefore direct the parties to this action to confer in an attempt to reach agreement as to the proper relief to be afforded by the court.[12] Within thirty (30) days of the date of this order, the parties shall, if possible, submit to the court a joint agreement detailing the nature and precise terms of the relief to be awarded. If the parties are unable to reach an accord, they shall within the same thirty-day period: (1) so

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[11] Nor would we necessarily reach a different result under rule of reason analysis. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). Considerations such as the need of the smaller shippers for the supposed efficiencies accompanying collective rate formulation and the fact that current intrastate rates are materially lower than interstate rates in the subject states, while perhaps quite meaningful from a policy standpoint, would have only limited significance to our inquiry. The focus would continue to be on the effect of collective ratemaking on price competition among intrastate carriers.

[12] The court expects that amici will be allowed full participation in all negotiations among the parties.

notify the court; (2) indicate those matters as to which there is agreement; and (3) submit proposals from each side in the areas of disagreement. The court will refrain from ordering interim relief, but expects that the parties will diligently proceed in complying with this order.

Accordingly, the court hereby GRANTS the government's motion for summary judgment and DENIES the defendants' motions for summary judgment.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.*
Unit B
April 5, 1982.

No. 79-3741.

UNITED STATES of America,
Plaintiff-Appellee,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and North Carolina Motor Carriers Association, Inc.,
Defendants-Appellants,

National Association of Regulatory Utility Commissioners,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before HILL and FRANK M. JOHNSON, Jr., Circuit Judges and SCOTT**, District Judge.

FRANK M. JOHNSON, Circuit Judge:

In 1976 the United States instituted this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, to enjoin the continu-

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

**Honorable Charles R. Scott, U.S. District Court Judge for the Middle District of Florida, sitting by designation.

ing violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by three rate bureaus. These defendants, Southern Motor Carriers Rate Conference, Inc. (SMCRC), North Carolina Motor Carriers Association, Inc. (NCMCA), and Motor Carriers Traffic Association, Inc. (MCTA), represent common carriers before the regulatory commissions of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. These rate bureaus perform three basic functions: (1) they provide a forum for competing member carriers to discuss and agree on rates for intrastate transportation of general commodities to be proposed to state public service commissions for approval; (2) they publish tariffs and supplements containing the rates on which the carriers agree; and (3) they provide counsel, staff experts, and facilities for the preparation of cost studies and other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions.[1] The government challenged the first of these functions as price fixing in violation of Section 1 of the Sherman Act.[2]

Deciding the case on cross-motions for summary judgment, the district court held defendants in violation of Section 1 and granted the government's motion. In so doing, the judge rejected defendants' arguments that their activities were immune under the state action doctrine or under the *Noerr-Pennington* doctrine and that their activities did not constitute an antitrust violation.

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[1] For further elaboration of the facts regarding the role of the rate bureaus, their relationship with the state regulatory commissions, and the general pattern of regulatory procedures in the five subject states, see the district court's carefully written opinion. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476-78 (N.D.Ga. 1979).

[2] In the district court, the state attorneys general of the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee participated as amici curiae. The National Association of Regulatory Utility Commissioners (NARUC) also was allowed to participate as an intervenor.

Two of the defendants, SMCRC and NCMCA, and the intervenor, The National Association of Regulatory Utility Commissioners, have filed this appeal. We affirm.

State Action Immunity

Appellants vigorously argue that their collective ratemaking falls within the "state action" exception to the antitrust laws. The Supreme Court first clearly articulated this exception in *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.2d 315 (1943). At issue in *Parker*, a suit against state officials, was an agricultural proration system established by a state statute authorizing a commission to impose marketing programs for raisins after petition by raisin growers and imposing penalties for failure to follow the programs. Federal antitrust law, the Court held, did not prohibit this system, for the Sherman Act was not intended to alter a state's action supplanting competition. The program at issue, established by "state command," was adopted and enforced by the state acting as sovereign. *See id.* at 352, 63 S.Ct. at 314. The Court explicitly noted that a state's mere authorization of parties to violate the Sherman Act or a state's participation with private parties in an agreement in restraint of trade would not insulate actions from the federal antitrust laws. *Id.* at 351, 63 S.Ct. at 313.

The particular issue regarding the state action exception that is crucial here is whether a private party may avail itself of the exception only if the state compels it to perform the disputed actions. Appellants assert that in *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Supreme Court eliminated any state compulsion prerequisite for private party invocation of the exception. We disagree with that assertion. Before we address the holding of *Midcal* itself, however, we believe that it would be worthwhile to elaborate on certain aspects of the exception that the Supreme Court has announced in cases since *Parker* that interpret what constitutes an act of the state as sovereign.

First, we believe that in cases prior to *Midcal* the Supreme Court has made clear that private parties can invoke the state action exception only if the state compels their actions.[3] In *Goldfarb* v. *Virginia State Bar Ass'n*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court struck down a minimum fee schedule the habitual violation of which would, according to the state bar association, raise a presumption of unethical conduct. Nothing that the bar association was not a state agency for the purposes at issue, the Court asserted that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the state acting as sovereign." *Id.* at 790, 95 S.Ct. at 2014. Similarly, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 359-60, 97 S.Ct. 2691, 2696-97, 53 L.Ed.2d 810 (1977), the Court, though striking down a ban on lawyer advertising on First Amendment grounds, distinguished *Goldfarb* by finding that the challenged restraint was the "affirmative command" of the Arizona Supreme Court, the body wielding the state's power over the

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[3] In asserting that there is a state compulsion requirement, we do not mean to suggest that private parties may have no role in proposing mandatory state action. In *Parker* and *New Motor Vehicle Bd* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1979), the Supreme Court has made clear that an action may still be compelled by the state even though private parties petitioned for the state to consider requiring such action. *See also California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *but cf. Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 594 & n.31, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) (action not required by state even though required by state commission tariff if action proposed by private party and tariff applies only to that party, not to parties statewide). Once a state has adopted some policy, however, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy.

practice of law, and so was " 'compelled by direction of the State as sovereign.' " *Id.* at 360, 97 S.Ct. at 2697 (quoting *Goldfarb*, 421 U.S. at 791, 95 S.Ct. at 2015). *See also Litton Sys., Inc.* v. *Southwestern Bell Tel. Co.*, 539 F.2d 418, 423 (5th Cir. 1976).

Second, the Supreme Court has not required that the state compel action of public institutions. In *Parker*, the state did not require a state commission to issue a mandatory program. Rather, it gave the commission the option of establishing the program after the petition of raisin growers. In *Bates* the Court specifically noted that its analysis differs substantially depending on whether the defendant is a public or private official or institution. *See also Community Communications Co.* v. *City of Boulder*, ___ U.S. ___, ___, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982) (suggesting mere state "sanction" of municipal action sufficient for invoking exception); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 n.40, 98 S.Ct. 1123, 1135 n.40, 55 L.Ed.2d 364 (1978) (plurality opinion) (same).

Third, an action purporting to be by the state as sovereign must further a clear state policy. The Supreme Court explored this requirement, which for private parties is in addition to the threshold state compulsion requirement, in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-98, 96 S.Ct. 3110, 3118-21, 49 L.Ed.2d 1141 (1976). At issue was a program of the Detroit Edison Co., a private defendant, approved by a state commission. Under the program, the company provided light bulbs without a charge separate from a customer's billings for electricity. The Court held that the program was not state action immune from the Sherman Act's purview. The Court found no necessary conflict between the state's regulation of the distribution of electricity and the federal interest in the competitive market for light bulbs. Moreover, noting that it would not find an exception unless required for the state regulatory program to function and then only to the minimum extent necessary, the Court found that Michigan's policy interest in regulating electricity would not be affected by the in-

applicability of the state action exception to the free light bulb program.[4] This consideration is equally applicable in suits against public defendants. In *Bates*, the Court, stating that for the purposes at issue the state bar was an agent of the state in enforcing a ban on advertising, specifically held *Cantor* inapplicable because "the regulation of the activities of the bar is at the core of the State's power to protect the public", 433 U.S. at 361, 97 S.Ct. at 2697, and the state policy was "clearly and affirmatively expressed". *Id.* at 362, 97 S.Ct. at 2698. *See also New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion).

Keeping in mind the three considerations present in the Supreme Court cases outlined above—the need for state compulsion of private defendants, for some lesser state directive for public defendants, and for a clear expression of state policy—we proceed to an analysis of *Midcal* itself. The statute at issue in *Midcal* required wine producers and wholesalers to file fair trade contracts or price schedules with the state. Wholesalers could not resell wine to retailers at prices below those on the contracts or schedules. The Supreme Court reviewed prior cases on state action immunity and held that they established a two-pronged standard. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively

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[4] The Court noted that it might find liability against a private party required to perform some action even if there was no clear state policy favoring the action if so finding would be unfair to the party, 428 U.S. at 594-95, 96 S.Ct. at 3119, and that it might not in all circumstances find that state policy concerns preempted federal antitrust law. *Id.* at 595, 96 S.Ct. at 3119. These concerns, however, arise only if the threshold state compulsion requirement is met. We find, in any event, no unfairness in this case in holding appellants to be in violation of the Sherman Act, *see* text at note 22, *infra*, and no state policy here strong enough to justify preempting federal antitrust law. *See* note 12, *infra*.

supervised' by the State itself." 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion)). California's regulatory system, the Court ruled, met the first prong but not the second; it therefore did not grant immunity from the antitrust laws.

At issue in this case is the meaning of the first prong of the standard.[5] We believe that this first prong of the *Midcal* standard did announce a broad, general standard for applying the state action exception, but that it merely is a general restatement incorporating earlier holdings that considered the exception as applied both to public and private defendants and with regard both to the need for state compulsion and for a clear articulation of state policy. By providing this broad overview the Court did not intend to alter the applicability of the exception in the particular contexts that the earlier cases had considered. In particular, the Court did not eliminate the requirement that the state compel action by private parties.

The correctness of our interpretation is evident on examination of the Court's opinion. First, there is not the slightest hint in *Midcal* that the Court no longer agreed with its earlier holdings. To the contrary, the Court cited those holdings with approval, even quoting *Goldfarb's* statement that "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign." 445 U.S. at 104, 100 S.Ct. at 942 (quoting 421 U.S. at 791, 95 S.Ct. at 2015). Indeed, the Court explicitly stated that its earlier decisions *established*

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[5] Neither in its brief nor at oral argument did the government take the position that the state regulatory commissions do not actively supervise the proposed collectively formulated rates through hearings to review the reasonableness of proposed tariffs. Moreover, the record evidence that the commissions routinely suspend the effectiveness of proposed tariffs and conduct hearings satisfies us that the second prong of the *Midcal* test has been met.

the standards announced in *Midcal*.[6] 445 U.S. at 105, 100 S.Ct. at 943. Second, the language the Court used to announce its standard, "clearly articulated and affirmatively expressed state policy", does not imply a departure from a compulsion requirement. Given the articulation of a general standard, there is no oddity in not mentioning in text the need for state compulsion in one particular application of the standard.[7] Moreover, in the context of private parties, we cannot see how

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[6] The Supreme Court, in a recent discussion of whether municipal action is state action exempt from antitrust oversight, has seemed to confirm that it views its decisions on state immunity as a continuum, rather than as establishing different standards before and after *Midcal*. *See Community Communications Co.* v. *City of Boulder*, ____ U.S. ____, ____, 102 S.Ct. 835, 848, 70 L.Ed.2d 810 (1982). Similarly, the Ninth Circuit recently has used the state compulsion requirement of *Goldfarb* in the context of applying the *Midcal* standards. *Ronwin* v. *State Bar of Arizona*, 663 F.2d 914, 918 (1981).

[7] In a footnote immediately following the articulation of its two-pronged standard in *Midcal*, the Supreme Court cited Note, *Parker* v. *Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*, 77 Colum.L.Rev. 898, 916 (1977), apparently as an example of the application of its standard. 445 U.S. at 105 n.8, 100 S.Ct. at 943 n.8. That Note, at the cited page, states that "[t]he mere fact that anticompetitive conduct by a private party effectuates a clearly articulated state regulatory policy is not in itself sufficient to justify a state action defense. . . . The defense is only available if the state has elected to effectuate its policy by *requiring* the private conduct under attack" (emphasis in original). The Court's citation to the Note is a testament to the continued vitality of the state compulsion requirement.

In footnote 8 the Court also cited *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971), and *Asheville Tobacco Bd.* v. *FTC*, 263 F.2d 502, 509-10 (4th Cir. 1959). *Norman's* found a mandatory filing program insufficient alone for there to be state action immunity. In *Asheville*, the Court noted both the absence of required state action and of state supervision. Neither case is inconsistent with, and both implicitly support, a state compulsion requirement in certain circumstances.

there ever could be a clearly articulated and affirmatively expressed state policy in any case in which the state allows an individual to choose at his whimsy the option of doing or not doing some act. Finally, the Court has in earlier cases used language similar or identical to that adopted in *Midcal*. *See New Motor Vehicle Bd.*, 439 U.S. at 109, 99 S.Ct. at 411; *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion) (quoted in *Midcal's* articulation of its standard); *Bates*, 433 U.S. at 362, 97 S.Ct. at 2684. If the use of such language in earlier cases did not alter the state compulsion requirement, there is no reason to interpret the language in *Midcal* as altering the requirement.[8]

Having determined that the state compulsion requirement remains an element essential to private party invocation of the state action exception, we must resolve whether the state regulatory programs at issue compel joint rate formulation. North Carolina General Statute § 62-152.1(b) states that in

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[8] The dissent reasons that *Midcal* eliminates the state compulsion requirement because the basis for state compulsion is the concern that the economic self-interest of the companies might affect the rate setting process. According to the dissent, the second prong of the *Midcal* analysis, the requirement of state supervision, assuages that concern. We believe that *Midcal* itself illustrates the invalidity of the presumption that state compulsion and state supervision have the same rationale. If the dissent were correct, the Supreme Court would have upheld state action immunity on the facts of *Midcal*, for state supervision would have been unnecessary since the state requirement mandating the filing of contracts and schedules would serve the same purpose. The Court did not, however, so rule, and rightly, for the state does not deprive competitors of their ability to subvert competition merely by requiring them to collude. Rather, as noted earlier, the state compulsion requirement fulfills a purpose entirely different from that underlying state supervision: it reaffirms the holding of *Parker* that an action must in effect be by the state as sovereign. If private parties were able to choose whether to follow some course of action, the decision concerning whether to pursue that action hardly could be said to be by the state.

order to realize and effectuate the policy of uniform rates among carriers, any party to an agreement with other carriers regarding uniform rates may apply to a state commission for approval of the agreement; Section 62.152.1(h) relieves parties to an agreement so approved from the operation of the antitrust laws. The statute does no more than authorize or permit collective ratemaking. There is no compulsion. Tennessee Public Service Commission Rule 1220-2-1.40 adopts Section 5a of the Interstate Commerce Act, 49 U.S.C.A. § 10706(b), which permits carriers to file joint rates and exempts those who do file such rates from the antitrust laws. In addition, Tenn.Code Ann. § 65-1506 permits the Public Service Commission to establish joint ratemaking procedures.[9] Again, there is no state

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[9] It is perhaps ironic that the government seeks to enjoin as a violation of federal antitrust laws activity by motor carriers operating in *intrastate* commerce that is exempted from federal antitrust laws when performed at the *interstate* level. Appellant SMCRC attempts to elevate this irony into an argument for implied immunity from the antitrust laws. We reject this argument.

Under 49 U.S.C. § 10706, the collective formulation of rates by motor carriers operating in interstate commerce is exempt from federal antitrust laws once these rates are approved by the Interstate Commerce Commission. According to SMCRC, this express exemption should be extended to collective rate formulation at the intrastate level. As authority for this position, SMCRC relies on *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 597 F.2d 593 (7th Cir. 1979), which held that this section should be construed to exempt intrastate railroad collective ratemaking that affects interstate commerce. The result in *Atchison* is explainable, and clearly distinguishable from this case, on the ground that the ICC has jurisdiction under the Shreveport rate doctrine over intrastate *railroad* rates that affect interstate commerce. *See Houston East & West Texas Railway Co.* v. *United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1942). The ICC has no similar jurisdiction over intrastate motor carrier rates. Indeed, 49 U.S.C. § 10521(b) expressly reserves this area for state regulation.

In the alternative, SMCRC contends that the pervasive state regulation permitted by Section 10521(b) creates an irreconcilable

compulsion. Georgia Code Ann. § 68-613, which requires a state commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures", explicitly indicates that Georgia intends to give carriers the option of filing rates jointly or individually.[10] A 1942 order of the Ala-

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conflict with federal antitrust laws which warrants an implied repeal of the antitrust laws in this situation. As SMCRC concedes, the implied repeal doctrine normally applies only to conflicts between federal antitrust laws and federal regulation, not to conflicts with state regulation. Moreover, the Supreme Court has observed repeatedly that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have been found only in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963). This presumption against implied repeal is just as strong where the conflict is with state regulatory policy. *Cantor*, 428 U.S. at 596-97 & nn.36, 37, 96 S.Ct. at 3120-21 & nn.36, 37. Even where such repugnancy is found, the antitrust laws are abrogated only to the extent necessary for the effective functioning of the regulatory scheme. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963).

We detect no irreconcilable conflict of the federal antitrust policy with either the Interstate Commerce Act, 49 U.S.C. § 10521(b), or with the existence of state regulation. As we noted above, the ICC has no jurisdiction over intrastate motor carrier rates. The Interstate Commerce Act then poses no conflict with the application of the federal antitrust laws to collective intrastate ratemaking among motor carriers. As to state regulatory policy, if an implied exemption is necessary for the effective functioning of the state scheme, the states may act to immunize private action taken in response to state policy by compelling private conduct as part of a clearly established or affirmatively expressed state policy.

[10] The State of Georgia, participating as amicus in the district court, presented a 1942 order issued by its public service commission stating that "all for hire motor common carriers operating under Class certificates be, and they are hereby, directed and required to

bama Public Service Commission requires carriers to "prepare, publish and file with the Commission an individual tariff or . . . participate in an agency issue." Record at 53. As with Georgia, Alabama explicitly permits individual rate applications. Finally, Mississippi in Miss.Code Ann. §§ 77-7-1 to -341 merely contemplates cooperation among carriers to the limited extent of establishing "joint rates."[11] This falls short of compelling joint applications for proposed rates. Having found that no state, the laws or regulations of which are at issue here, compels private parties to make joint ratemaking applications, we find the state action exception inapplicable.[12]

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publish and file with this Commission . . . *a tariff* containing all local and joint class and/or commodity rates applicable between points within Georgia." Record at 693. Pointing to the italicized language, the state argued that the commission "clearly directed all Class 'A' carriers to file a single joint tariff with the Commission," thus indicating its policy in favor of collective action. *Id.* We are not persuaded that the language of the 1942 order is susceptible of only this interpretation. At best it is ambiguous. Given the statute, only recently amended to insert the provisions outlined in text, it would not, in any event, be controlling.

[11] A "joint rate" is a single rate applied jointly by two carriers to cover a shipment in which one carrier operates over only part of the route and the other carrier serves the remaining distance to the destination.

[12] We note that, even if state compulsion were not a requirement after *Midcal*, we would still find the state action exception inapplicable here because of the absence of a clearly articulated and affirmatively expressed policy in favor of joint rate applications in any state at issue. In none of these states do the statutes do more than, at most, authorize joint rate agreements. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker* v. *Brown*, 317 U.S. 341, 344, 351, 63 S.Ct. 307, 310, 313, 87 L.Ed. 315 (1943). Moreover, *Cantor* indicates that, for a state to have a clear policy in favor of an action, that action must be essential to the functioning of the state regulatory system. 428 U.S. at 597-98. No

Noerr-Pennington Doctrine

Appellants next assert that, under the *Noerr-Pennington* doctrine,[13] antitrust sanctions may not be applied against them because their collective activities consist solely of protected attempts to influence public officials. We agree with the district judge's rejection of this argument and adopt in part the rationale of that court.

> The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect,

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state's statutes or regulations indicate, nor does the evidence show, that joint rate agreements are necessary for state ratesetting procedures to work.

[13] In *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Supreme Court legitimated the joint efforts of businessmen to influence legislative or executive action, even though these efforts were designed to injure their competitors. In holding that this "combination" was not actionable under the Sherman Act, the Court stated:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139, 81 S.Ct. at 530. Later in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Court followed *Noerr* in the context of efforts by large mining companies and labor unions to persuade the Secretary of Labor to set wage rates at such high levels that the mines' smaller competitors would be driven out of business. "[J]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670, 85 S.Ct. at 1593. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), the Court approved the notion that *Noerr's* protection extends to activities aimed at influencing administrative agencies.

ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

This case is not technically one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors.

467 F.Supp. at 484-85 (citation omitted).

Indeed the Court's discussion in the *Noerr* case itself lends support to the trial court's conclusion "that the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine." *Id.* at 485. In *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Court pointed to the "essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act," such as combinations in which the participants "jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price fixing agreements." *Id.* at 136, 81 S.Ct. at 528.[14] Moreover, the kind of collective action at issue here seems at odds with the thrust of the *Noerr-Pennington* doctrine, which assures public to the channels of government policymaking. While the joint efforts of the bureaus to secure legislation or commission regulation permitting collective ratemaking procedures would clearly fall within the ambit of *Noerr* protection, inasmuch as it would seek to influence policy, collective action to determine

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[14] With respect to the right to petition aspect of the bureaus' claim, "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport*, 404 U.S. at 514, 92 S.Ct. at 613 (citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949)).

the rates which the bureaus desire the commission to approve is not of the same genre.

The Sherman Act Violation

Having found appellants not to be beyond the ambit of the Sherman Act, we must address directly whether their actions are violations of Section 1 of that Act. Appellants present two arguments: (1) that the practice of collective rate formulation does not constitute price fixing because the states, rather than the carriers, ultimately determine the rates to be charged; and (2) that the bureaus' activities must be evaluated under a rule of reason analysis, which dictates a finding that the bureaus did not unreasonably restrain trade.

As the district court observed, the power of the states, through their public service commissions, to review the reasonableness of proposed rates does not alter the essential anticompetitive nature and effect of a horizontal agreement among competitors regarding rates to be charged. In *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), the Supreme Court held that a combination among regulated railroads to fix rates stated a claim for price fixing under Section 1 of the Sherman Act, even though the Interstate Commerce Commission reviewed and approved proposed rates. The Court explicitly rejected the argument urged here by the rate bureaus.

> The fact that the rates which have been fixed may or may not be held unlawful by the Commission is immaterial to the issue before us . . . [E]ven a combination to fix reasonable and non-discriminatory rates may be illegal . . . . The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws.

Id. at 460, 65 S.Ct. at 727 (citation omitted).[15] Moreover, both the Reed-Bulwinkle Act, 49 U.S.C. § 10706, at the interstate

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[15] Appellants attempt to undercut the force of the Supreme Court's rationale by pointing out that in states such as North Carolina the

level and the state statutes extending state antitrust immunity to collective ratemaking at the intrastate level are premised on the recognition that, absent such immunity, this activity would contravene antitrust prohibitions on price fixing.[16]

Thus we agree with the district court that "the practice of collective rate publication easily fits the classic description of a 'naked price restraint.'" 467 F.Supp. at 486. Collective formulation clearly tampers with the price structure for intrastate transportation of general commodities; the rate bureau arrangement substitutes concerted pricing decisions among competing carriers for the influence of impersonal market forces on proposed rates. Such combinations traditionally have been condemned as illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). It is irrelevant that, as the bureaus argue, the

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public service commission regulates not only the reasonableness of rates but also the collective agreement pursuant to which rate proposals are formulated. *See* N.C.Gen.Stat. § 62-152.1 (Cum.Supp.1981). In essence, appellants argue that the fact of state regulation not only renders their activities immune as state action but also precludes characterization of their activities as price fixing. They press the point even further by arguing that the regulatory context of this case mandates application of a rule of reason analysis. For reasons we shall discuss *infra*, we decline to accord such extensive significance to the impact of state regulation.

[16] The Interstate Commerce Commission has so viewed collective ratemaking agreements as to interstate activity.

> [W]hether an agreement will have anticompetitive effects is presumed. This presumption arises from the holdings of the Courts that the interests to be protected by the antitrust laws are always harmed by collective rate-making agreements and that agreements such as these violate the antitrust laws *per se* without official exemption.

Tidewater Coal Demurrage Agreement, 356 I.C.C. 66, 75 (1978). *See also* H.Rep.No. 1100, 80th Cong. 2d Sess. (1947), *reprinted in* [1948] U.S.Code Cong.Serv. 1844 (referring to the uncertainty as to the legality under the antitrust laws of such agreements).

state regulatory commissions' ultimate authority to determine which intrastate rates become effective deprives the bureaus of any real power directly to fix prices at a particular level. It is sufficient for Sherman Act liability if the purpose or the effect of the combination is that of "raising, depressing, fixing, pegging, or stabilizing the price." *Id.* at 223, 60 S.Ct. at 844. Here the rate bureaus cannot disclaim any purpose to inhibit competition among their member carriers in the fixing of proposed rates for the same service. Moreover, the effect of joint ratesetting is to reduce the amount of independent rate filing that otherwise would characterize the market process.

The appellants nevertheless argue that their conduct must be evaluated under a rule of reason analysis. We disagree. The bureaus' reliance on *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979),[17] in support of a rule of reason approach is misplaced. In *Broadcast Music* the Supreme Court refused to condemn the issuance of blanket licenses to copyrighted musical compositions by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) at fees negotiated by ASCAP and BMI as a form of price fixing *per se* illegal under the Sherman Act.[18] Influencing the

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[17] *Broadcast Music* was decided together with *American Society of Composers, Authors and Publishers* v. *Columbia Broadcasting System, Inc*

[18] The licensing scheme employed by both ASCAP and BMI followed a similar pattern. Owners of copyrighted works, who under copyright law alone possess the exclusive right to perform the work publicly for profit, grant the organization of which they are a member (ASCAP or BMI) a nonexclusive right to license performances of their work. A blanket license from ASCAP or BMI gives the licensee, for a flat fee or percentage of total revenues, the right to perform any and all of the compositions owned by members of the organization as often as desired for a stated term. The organization distributes royalties generated by the licenses among its members in a manner that reflects the nature and amount of use of their music.

Court's adoption of a rule of reason approach was its determination that the licensing scheme *achieved purposes unrelated to price formation*. The same cannot be said of the practice of collective rate formulation.

In *Broadcast Music* the Court reasoned: "The blanket license, as we see it, is not a 'naked restraint of trade with no purpose except stifling of competition,' . . . but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use." *Id.* at 20, 99 S.Ct. at 1562 (citations omitted). Because of the virtual impossibility of engaging in thousands of individual negotiations for the performing rights to copyrighted compositions, and the difficulty, from the user's perspective, of reporting uses and, from the copyright owner's perspective, of policing unauthorized performances, the blanket license arose as a practical necessity in the market for performing rights. It gave users unlimited access to BMI and ASCAP's repertory of copyrighted works and gave the owners reliable protection against infringement. *Id.* at 20-21, 99 S.Ct. at 1562-63. Thus, the blanket licensing scheme created a forum for linking buyers and sellers—*i.e.*, users and owners—and yielded improvements in the market for performing rights of copyrighted compositions which were unrelated to price. In contrast, the practice of joint formulation creates no market for trucking services that would not exist if individual carriers formulated their own proposed tariffs. The effect of the practice, if it has any at all, can only be on price formation. *See generally* L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154, § 74 pp. 200-02 (1977).[19] The economic

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[19] *Broadcast Music* and its rule of reason approach are distinguishable on yet another ground. The Court noted that the blanket license offered by ASCAP and BMI was a product different from the license which could be offered by individual copyright owners since the former consisted of many individual compositions plus the aggregating services performed by the organization. Hence, ASCAP and BMI were sellers, separate from the copyright owners, in a product market in which individual composers could not compete. 441

advantages to the member carriers[20] cannot justify the inhibiting effect on price competition. *See id.* § 24, p. 203. Nor can the elimination of so-called destructive competitive practices justify it. *Socony*, 310 U.S. at 220-21, 60 S.Ct. at 842-43. Arguments based on economic efficiencies essentially resolve themselves into the contention that concerted decisionmaking rather than competition is preferable. *See* L. Sullivan, *supra*, § 74, p. 202. The policy of the Sherman Act is to the contrary.[21]

Appellants also urge consideration of the regulatory context of this case as sufficient reason to invoke a rule of reason analysis. Indeed, we have acknowledged that "consideration of federal and state regulation is proper in *certain instances* even after the issue of antitrust immunity has been resolved." *Mid-Texas Communications Systems, Inc.* v. *American Telephone and Telegraph Co.*, 615 F.2d 1372, 1385 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980) (citing *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627, 94 S.Ct. 2856, 2872, 41 L.Ed.2d 978 (1975), and *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360-61, 83 S.Ct. 1246, 1258-59, 10 L.Ed.2d 389 (1963)) (emphasis added). We

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U.S. at 21-23, 99 S.Ct. at 1563-64. The rate bureaus cannot be viewed analogously as purveyors of a product or service which could not be provided by their individual constituent member carriers.

[20] Asserted advantages include cost-savings in the formulation and publication of rate tariffs, which in turn enable small carriers, which lack the means to prepare and justify their own rate proposals, to remain competitive with large carriers.

[21] We are aware that our colleagues in the Ninth Circuit have declined to apply a *per se* rule to the setting by majority vote of maximum fees that physician members of foundations for medical care (FMC) may claim in full payment for health services they provide to policy holders of FMC-approved insurance plans. *Arizona* v. *Maricopa County Medical Society*, 643 F.2d 553 (9th Cir. 1980), *cert. granted*, 450 U.S. 979, 101 S.Ct. 1512, 67 L.Ed.2d 813 (1981). This result, we believe, is based on too broad a reading of the decision in *Broadcast Music*.

are convinced, however, that this is not one of those instances in which the fact of state regulation determines the standard by which we measure the anticompetitive effect of the challenged conduct and thus the ultimate issue of liability.

In declining to do so, we cannot be accused of being "so inflexible as to deny consideration of governmental regulation." *Id.* At every turn appellants have urged us to consider the impact of state regulation on the trucking industry—its impact on the availability of immunity, on the characterization of their conduct, and on the standard for measuring liability. We believe that on the facts of this case any deference to the impact of state regulation is appropriate only in determining whether the challenged conduct is immune under the state action doctrine.

We perceive appellants' arguments on the liability issue to have three possible, somewhat overlapping, connotations: that the impact of state regulation deserves consideration (1) because regulation is just another fact of market life to which they have responded, (2) because a state interest is at stake in the challenged conduct, or (3) because it is unfair to penalize action which is merely a response to state regulatory interests.

With respect to the first reason, treating state regulation as a fact of market life may be quite proper if regulation precludes the existence of factual predicates upon which antitrust liability hinges. Such was our concern in *Mid-Texas Communications*, in which we directed assessment on remand of the effect of regulation on the defendant's power to exclude competition in the relevant market (*i.e.*, on whether the defendant possessed monopoly power) and on defendant's alleged willful misuse of its monopoly power. 615 F.2d at 1386-90. Both the possession of monopoly power and its willful misuse are necessary to sustain a charge of illegal monopolization under Section 2 of the Sherman Act. *Id.* at 1385-86. In the context of price fixing allegations, however, the antitrust focus is not on market power, but on the purpose or effect of the combination. *Socony*, 310 U.S. at 221, 60 S.Ct. at 843. *See* L. Sullivan, *supra*, § 70, p. 192. Moreover, in cases in which courts have

regarded the impact of regulation on predicates to liability, the courts did not alter the standard for measuring liability, as appellants here urge us to do. *See Mid-Texas Communications Systems, Inc.* v. *American Telephone and Telegraph Company*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980); *International Telephone and Telegraph Corp.* v. *General Telephone and Electronics Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975) ("]T]he fact of regulation is significant, but not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law.").

As for the second reason—the presence of a state interest in the challenged conduct—the state action doctrine is designed to vindicate that interest. Indeed, deference to the state interest and the sovereignty of the state is at the heart of that doctrine. Accordingly, we have considered above the impact of state regulation and have found no immunity. Deference to the state's interest should not be broadened to the extent that every antitrust concept, including the *measure* of liability, must accommodate the state's interest.

Finally, with respect to the fairness argument, we recognize that injustice may be done by allowing damage relief against a private defendant whose activity is a legitimate response to state legislation or regulation. Because the govenment has sought only injunctive relief against the appellants, this concern need not detain us. In addition, such fairness considerations apply more properly to the questions of immunity from liability[22] and the shaping of appropriate remedies and should not sway us to alter the standard of liability.

Accordingly, for the reasons stated the judgment of the district court is AFFIRMED.

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[22] *See* note 4, *supra; cf. Cantor*, 428 U.S. at 592-95, 96 S.Ct. at 3118-19 (discussing an unfairness theory as support for clothing private conduct required by the state with state action immunity); *Mid-Texas Communications*, 615 F.2d at 1380 ("Fairness to the regulated industry is an important factor . . . in determining whether antitrust immunity exists.").

HILL, Circuit Judge, dissenting:

I respectfully dissent from the majority's resolution of the issue of state action immunity. In evaluating the effect of *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), on this case, I am persuaded that it establishes a standard different from that applied by the district court[1] and that the majority has misinterpreted the *Midcal* standard. I would therefore reverse and remand in part for further consideration.

The central issue in this case—whether the practice of collective rate formulation employed by the rate bureaus is immune from antitrust attack under the state action doctrine—is one beset with difficulties. Of state action immunity it is well said that "[u]nlike many other phantasmagoria of the law, we know it is there, but it is hard to define precisely what it is, and, unlike obscenity, we do not always know it even when we see it." Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 Nw.U.L.Rev. 31, 31 (1979). Moreover, the Supreme Court's decision in *Midcal* has not removed all the uncertainties in this area, for the parties dispute both the meaning and the application of the standards set forth in *Midcal*. Finally, sensitive policy considerations influence the choices to be made. On the one hand there is the strong policy in favor of competition that underlies the federal antitrust laws. On the other are the right of the states to engage in economic regulation and all the federalism implications which the potential conflict between state and federal regulation may generate.

In *Midcal*, after reviewing the line of cases following *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the

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[1] *Midcal* was decided after the district court had entered final judgment in this case. Hence the district court did not have the benefit, as do we, of the Supreme Court's pronouncement on this subject.

Supreme Court set forth two standards for determining when the state's involvement is sufficient to justify immunity of the challenged conduct. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.)). Thus, whether the defendant be a state or state instrumentality or a private party,[2] *Midcal* directs that the focus for immunity purposes must be upon the extent of the state's involvement in the challenged restraint—that is, upon the kind of imprint of state authority the anti-competitive activity bears.

Midcal examines the extent of the state's involvement at two levels—first, at the level of articulation of a state policy in favor of the challenged restraint and second, at the level of implementation of that policy through active supervision. Significant state involvement at both levels is necessary to justify exemption of the anticompetitive conduct under the state action doctrine. Hence the balance that the Supreme Court has struck between the federal policy of competition and the states' sovereignty is this: the state may choose to displace competition with economic regulation by making clear its intention to do so; once it has made that choice, however, the state bears

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[2] In announcing its two-pronged test in *Midcal*, the Court purported to derive it from the *Parker* line of cases, citing cases involving private defendants, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), as well as cases involving governmental defendants, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), and *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978).

the burden of ensuring that this policy is furthered and that it remains the ultimte decisionmaker.[3]

In testing the actions of private parties under *Midcal* standards, I am convinced that state compulsion of the private activity, as set forth in *Goldfarb*, is not a *sine qua non* for

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[3] There may be substantive limits on what conduct the state may immunize by making the challenged restraint a state policy. Indeed, there is some suggestion in Supreme Court precedent that federal antitrust laws do place substantive limits on the content of state economic regulation. *See, e.g., Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (invalidating a Louisiana fair trade statute containing a "non-signer" provision under which a retailer could be enjoined from knowingly underselling another retailer whose prices were set under a resale price maintenance contract, exempt from antitrust laws under the Miller-Tydings Act, with a supplier). *But see* 1 P. Areeda & D. Turner, Antitrust Law 70 (1978) (interpreting this decision as an inadequate supervision case). *See generally* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L.Rev. 693 (1974). Those limits may be reached in areas, unlike the private utility regulation involved here, that have not traditionally been regulated by the states.

Fortunately, we are not called upon here to delineate those boundaries. At least one member of the Supreme Court and some commentators have urged an express preemption analysis, which involves the difficult weighing of the state interest at stake against the federal interest in a competitive economy. *See Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 605, 96 S.Ct. 3110, 3124, 49 L.Ed.2d 1141 (1976) (Blackmun, J., concurring); Posner, *supra;* Note, Parker v. Brown *Revisited: The State Action Doctrine After* Goldfarb, Cantor, *and* Bates, 77 Colum.L. Rev. 898, 929-30 (1977) (suggesting that a preemption analysis explains the Court's result in some of the cases in the *Parker* line). *But see Cantor*, 428 U.S. at 627, 96 S.Ct. at 3134 (Stewart, J., dissenting) (warning that a preemption approach is a return to the discarded substantive due process doctrine). *Cf. Community Communications Co.* v. *City of Boulder*, ___ U.S. ___, ___, 102 S.Ct. 835, 845, 70 L.Ed.2d 810 (1982) (Rehnquist, J., dissenting) (arguing that state action should be analyzed as a

clothing private conduct with state action immunity. It is on this point that the majority and I differ. To state the point more plainly, state compulsion is not the *only* way to satisfy the first prong of the *Midcal* test; such compulsion is merely the best evidence that the challenged restraint is a "clearly articulated and affirmatively expressed" state policy.

Support for this interpretation of *Midcal* may be found in the language of that opinion. The resale price maintenance scheme established by the California statute *required* of wine wholesalers, on pain of fines or of license suspension or revocation, adherence to the pricing scheme. 445 U.S. at 100, 100 S.Ct. at 940. In concluding that the first prong of the *Midcal* test had been satisfied, however, the Court did not track the *Goldfarb* language and reason that the first prong was met because the state "compelled" resale price maintenance. It chose instead to say: "The legislative policy is forthrightly stated and clear in its purpose *to permit* resale price maintenance." *Id.* at 105, 100 S.Ct. at 943 (emphasis added).

Moreover, I believe that the function served by the *Goldfarb* compulsion requirement is served as well by the *Midcal* formulation. Where private parties are involved to any extent in the state's scheme of economic regulation, there is properly a concern that the economic self-interest of those parties may infect the decisionmaking process and result in harmful anticompetitive activity. Such private self-interest does not warrant the cloak of state action immunity. By requiring that a state actively supervise the implementation of its economic policy, the *Midcal* test ensures that the *state* has determined that the challenged activity is in furtherance of the *state's* policy. Hence the second prong of *Midcal* addresses the con-

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preemption problem). The Court, however, has never forthrightly adopted this approach, and, for the present, it appears to have resolved the tension between federalism and antitrust concerns on the side of federalism, albeit with the requirement of active state supervision of the anticompetitive activity. *Midcal* thus reiterates the federalism concerns at the heart of *Parker*.

cern in *Goldfarb* by ensuring that the state does not abdicate its responsibility to private parties.[4] When the state ceases to be the real party in interest by abandoning control over a segment of its economy to private parties, the sovereignty of the state cannot be said to be impaired by withholding state action immunity.[5] Thus the *Midcal* test preserves to the states the freedom to pursue state regulatory policies free of antitrust sanctions without at the same time permitting the purely economic self-interest of private parties to disrupt the forces of competition.

Finally, Professor Areeda's views are in accord with the interpretation I have placed on *Midcal's* effect on the *Goldfarb*

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[4] Professor Areeda has suggested that *Midcal's* active supervision requirement is inapplicable to governmental defendants. Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv. L. Rev. 435, 445 n.50 (1981) ("A few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active supervision of *private* parties) to require state supervision of *governmental* defendants."). In *Community Communications Co.* v. *City of Boulder*, the Supreme Court expressly declined to decide whether the active supervision criterion must be met by a municipality with respect to the challenged ordinance. ___ U.S. ___, ___ n.14, 102 S.Ct. 835, 841 n.14, 70 L.Ed.2d 810 (1982). If that criterion serves the function identified above, Professor Areeda's suggestion would appear correct.

[5] The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

1 P. Areeda & D. Turner, Antitrust Law 73 (1978) (footnotes omitted).

compulsion requirement. In discussing the *Goldfarb* and *Cantor* cases, Areeda has commented:

> Compulsion . . . should not be read as an independent requirement for state action immunity; rather, its presence or absence should serve only as strong evidence about state intent. Admittedly, however, some doctrinal confusion exists on this point.
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> . . . .
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> The Supreme Court and lower courts have not applied the compulsion language literally. In *Midcal* . . . , the Court defined the critiria for immunity *not in terms of compulsion* but in terms of supervision and articulated state policy; the emphasis on supervision implies public scrutiny, deliberation, and review, but *not command*.

Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 438 & n.19 (1981) (citation omitted) (emphasis added). He went on to explain the result in *Goldfarb* and *Cantor* (no immunity) as hinging not on absence of compulsion but on absence of meaningful state participation in the challenged conduct. *Id.* n.19.

In applying the *Midcal* test as I understand it to the facts of this case, I think it clear that at least the states of North Carolina, Tennessee, and Georgia have policies favoring collective rate formulation by the rate bureaus.[6] As to the remaining states, I would remand the case to the district court for further development of the factual record and for evaluation under the *Midcal* test.

By legislative enactment the state of North Carolina has clearly endorsed collective rate formulation as a means for achieving the goals of its public service commission. Section 62-152.1(b) of the North Carolina General Statutes provides:

> For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the

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[6] As indicated by the majority, *see* note 5 *supra* in the majority opinion, the government did not contend on appeal that the active supervision requirement has not been satisfied.

> same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this commission and party to *an agreement between or among two or more carriers relating to rates*, fares, classifications, divisions, allowances or charges . . . or rules and regulations pertaining thereto, or *procedures for the joint consideration*, initiation or establishment thereof, *may under such rules and regulations as the commission may prescribe, apply to the commission for approval of the agreement* . . . .

The effect of such commission approval is set out in section 62-152.1(h).

> Parties to any agreement approved by the commission under this section and other parties are . . . hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the commission.

These North Carolina provisions parallel the provisions of the Interstate Commerce Act which exempt from *federal* antitrust laws agreements concerning collective ratemaking among motor carriers opeating in interstate commerce. Moreover, they unmistakably indicate that collective rate formulation is part of the regulatory policy of the state of North Carolina. I would therefore hold the joint ratemaking activities of the rate bureaus in that state immune.

Likewise, I would hold the activities of the appellants in Tennessee immune under the state action doctrine. By express commission regulation Tennessee has made clear its intention to permit and encourage collective rate formulation. Rule 1220-2-1-.40 of the Tennessee Public Service Commission states:

> The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the

> joint consideration, initiation or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act [now codified as 49 U.S.C. § 10706(b)], are hereby adopted by the Tennessee Public Service Commission; provided, however, that the final determination on any rates, fares, classifications, divisions, allowances, charges, rules and regulations or procedures shall be left in its final determinations to the Tennessee Public Service Commission.

In addition, Tennessee has reiterated its policy in favor of collective action by the carriers by a 1980 amendment to its Motor Carrier Act which vests the Tenneseee Public Service Commission with power to establish collective ratemaking procedures. Tenn.Code Ann. § 65-1506 (Cum.Supp.1981). All carriers who are party to a collective ratemaking agreement must comply with these procedures.

With respect to Georgia, that state has recently amended its Motor Common Carrier Act of 1931 to require its public service commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures for the joint consideration, initiation and establishment of such rates and charges." Ga.Code Ann. § 68-613 (Cum.Supp.1981). All motor common carriers subject to the commission's authority are "required to comply with such ratemaking procedures." *Id.* This legislative pronouncement convinces me that state action immunity would be available to the appellants' activities in Georgia.

The state of Alabama presents a more difficult question. In the proceedings in the district court, Alabama referred to a 1942 order of its public service commission as evidence that collective rate formulation is a clearly articulated and affirmatively expressed state policy. On April 20, 1942, the Alabama Public Service Commission ordered that certain motor carriers "prepare, publish and file with the Commission an individual tariff, or . . . *participate in an agency issue.*" Record at 53. It is unclear whether "agency issue" indicates that carriers may publish their tariff through an agent or that carriers may jointly formulate the rates to be proposed in their

tariffs. The term is not defined in the record. I would therefore remand to the district court for further development of the record to determine whether the rules and regulations of, or the enabling legislation governing, the Alabama Public Service Commission clearly articulate a policy in favor of collective formulation by carriers.

Finally, as with Alabama, whether the policy of the state of Mississippi conforms to the "clearly articulated and affirmatively expressed" standard in *Midcal* is unclear from the record developed prior to this appeal. A review of the statutory scheme, Miss.Code Ann. §§ 77-7-1 to -341 (1972), contemplates cooperation among the carriers to the limited extent of establishing joint rates. This falls short, however, of a clear policy in favor of joint formulation of any proposed rates. Nor did Mississippi present any rules or regulations of its public service commission which might reveal such a policy. I would therefore remand for further development of the record as to Mississippi and for decision by the district court in light of what I deem to be the appropriate construction of *Midcal*.

For the above reasons, I dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit.*
Unit B
June 7, 1982

No. 79-3741.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., and North Carolina Motor Carriers Assoc., Inc.,
Defendants-Appellants,

National Association of Regulatory Utility Commissioners,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 5, 1982, 5 Cir., 672 F.2d 469).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing

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* Former Fifth Circuit case, Section 9(3) of Public Law 96-452—October 14, 1980.

en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc *with oral* argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
Unit B
April 11, 1983.

No. 79-3741.

UNITED STATES of America,
Plaintiff-Appellee,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., and North Carolina Motor Carriers Association, Inc.,
Defendants-Appellants,

National Association of Regulatory Untility Commissioners,
Intervenor-Appellant.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON and THOMAS A. CLARK, Circuit Judges.

FRANK M. JOHNSON, Jr., Circuit Judge:

In November 1976 the United States instituted this action under Section 4 of the Sherman Act, 15 U.S.C.A. § 4, to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C.A. § 1, by three rate bureaus. These defendants, Southern Motor Carriers Rate Conference, Inc. (SMCRC), North Carolina Motor Carriers Association, Inc. (NCMCA), and Motor Carriers Traffic Association, Inc. (MCTA), represent common carriers before the regulatory commissions of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee. The rate bureaus perform three basic functions: (1) they provide a forum for competing member carriers to discuss

and agree on rates for intrastate transportation of general commodities to be proposed to state public service commissions for approval; (2) they publish tariffs and supplements containing the rates on which the carriers agree; and (3) they provide counsel, staff experts, and facilities for the preparation of cost studies and other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions.[1] The government challenged the first of these functions as price fixing in violation of Section 1 of the Sherman Act.

The district court granted the government's motion for summary judgment and held that defendants were in violation of Section 1. The court rejected arguments[2] that defendants' activities were immune under the state action doctrine or under the *Noerr-Pennington* doctrine. Defendants SMCRC and NCMCA and intervenor NARUC appealed, and a panel of the former Fifth Circuit affirmed. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. Unit B 1982). The Court en banc voted to rehear the case to consider two issues: first, whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions; and second, whether, if state compulsion is not necessary, the state policies here at issue were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply.

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[1] For further elaboration of the facts regarding the role of the rate bureaus, their relationship with the state regulatory commissions, and the general pattern of regulatory procedures in the five subject states, see the district court's carefully written opinion. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476-78 (N.D.Ga.1979).

[2] In the district court, the state attorneys general of the states of Alabama, Georgia, Mississippi, North Carolina, and Tennessee participated as amici curiae. The National Association of Regulatory Utility Commissioners (NARUC) also was allowed to participate as an intervenor.

We hold that compulsion is required of private parties and thus do not reach the second issue. Accordingly, we affirm the judgment of the district court.

The Supreme Court first clearly articulated the "state action" exception to the antitrust laws in *Parker* v. *Brown*, 317 U.S. 341, 53 S.Ct. 307, 87 L.Ed. 315 (1943). At issue in *Parker*, a suit against state officials, was the applicability of the Sherman Act to an agricultural proration system established by a California statute authorizing a commission to impose marketing programs for raisins upon the petition of raisin growers. Once the program was approved and instituted by the commission, participation by the growers was mandatory; under the statute, growers who refused to follow a program once instituted were subject to fines and imprisonment. *Id.* at 347, 63 S.Ct. at 311-312.[3] Analyzing the intent of Congress in enacting the Sherman Act, the Court concluded that, insofar as the Act applied only to "persons," Congress intended application of the Act to the "business combinations" of "individuals and corporations." *Id.* at 351, 63 S.Ct. at 313-314. The Act was not, therefore, intended to "restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51, 63 S.Ct. at 313. Congress made no mention of states, and "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351, 63 S.Ct. at

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[3] Appellants seek to characterize *Parker* as a case in which individual growers were not compelled to act anticompetitively, citing a provision of the program which permitted growers to set aside up to 30% of their crops for sale on the free market. The 30% set-aside provision, however, did not affect the ability of a grower to elect not to participate as to the remaining 70% of his crops. In this sense, the state mandated the participation of every grower and compelled the challenged anticompetitive behavior.

313.[4] Applying this analysis to the California program, the Court reasoned that the Sherman Act was not intended to apply to the state of California in its establishment of a program operating under "state command." "The state in adopting and enforcing the prorate program," the Court concluded, "made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352, 63 S.Ct. at 314. The Court's opinion in *Parker* therefore established the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign.

The fact that the Court in *Parker* concluded that Congress did not intend to restrain anticompetitive acts attributable to states of course did not mean that only states could assert a state action defense. Thus, while *Parker's* holding applied to state party defendants, the Supreme Court in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), suggested that a defense of state action may also be available to private parties under certain limited circumstances. *Goldfarb* was a class action against the Virginia State Bar and a Virginia county bar association in which the Court considered the validity under the Sherman Act of a minimum fee schedule for lawyers published by the county bar association. After determining that the county bar association was not a state agency,[5] the Court addressed the "threshold inquiry" of

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[4] Significantly, this reference to federalism concerns was directed not to any limitation on Congress' power to act; instead, it was stated merely as a rule of statutory interpretation—that is, whether and to what extent Congress had chosen to override existing state regulation.

[5] The State Bar was, for "some limited purposes," a state agency. 421 U.S. at 791, 95 S.Ct. at 2015. But because the fee schedule itself was published by the county bar association, we agree with those who characterize *Goldfarb* as an action against a private party. *Cf. Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53

whether the bar association's "activity is required by the State acting as sovereign." *Id.* at 790, 95 S.Ct. at 2015. The county bar association had argued that its action was "prompted" by the state, but a unanimous Court held that this was not enough for a state action defense. Rather, the action must be "compelled by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015. Deciding that the state of Virginia did not require the publication of minimum fee schedules, the Court stated that it "need not inquire further into the state-action question," *id.* at 790, 95 S.Ct. at 2015, and held that the challenged action was not state action for Sherman Act purposes.

After *Goldfarb*, the question remained as to what wold be required in addition to the threshold compulsion requirement for a finding of state action for private parties. This question was partially answered the next term in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1441 (1976). At issue in *Cantor* was a program in which Detroit Edison—a private defendant—provided light bulbs to its electricity customers without a separate charge. Detroit Edison could not discontinue its program, the Court stated, without the approval of a Michigan state commission, and in this sense the threshold compulsion requirement was at least formally satisifed. *See id.* at 592, 96 S.Ct. at 3118 ("In this case we were asked to hold that private conduct *required by state law* is exempt from the Sherman Act." (emphasis added)); *id.* at 594, 96 S.Ct. at 3119.[6] As *Goldfarb* had hinted, however, compul-

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L.Ed.2d 810 (1977) (antitrust claims raised only against state bar, which was a state defendant).

[6] In determining whether compulsion is present, we do not believe that private parties may have no role in proposing mandatory state action. In *Parker* and *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1979), the Supreme Court made it clear than an action still may be compelled by the state even though private parties petitioned the state to consider requiring such action. *See also California Motor Transp. Co.* v. *Trucking Unli-*

sion alone was not enough, particularly in *Cantor*, where "there can be no doubt that the option to have, or not to have, such a program is primarily [Detroit Edison's], not the [State's]," *Id.* at 594, 96 S.Ct. at 3119, and where the state was neutral as to the desirability of providing the light bulbs. Noting that it would not find an exception to federal antitrust law unless one was required for the state regulatory program to function, a majority of the Court concluded that Michigan's policy interest in regulating electricity would not be affected by the inapplicability of the state action doctrine.[7] Thus, although Detroit Edison's action was formally commanded by the state, the Court declined to grant the company state action immunity where no significant state interest would be undermined by enforcement of federal antitrust law. This discussion as to the factors necessary for private party invocation of the state action doctrine is, however, for the most part not at issue in the present case. It is enough for our purposes that the Court premised its discussion on the fact that Detroit Edison's action was "required" by the state. *Id.* at 592, 96 S.Ct. at 3118. In fact, although there were four separate opinions in *Cantor*,

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mited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In *Cantor*, formal compulsion was present despite the fact that Detroit Edison could with little difficulty have petitioned the state commission for discontinuance of the program which the company itself had proposed. Thus, by compulsion we mean something less than that envisioned by some commentators. *See e.g.*, 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 215 (1978). Still, once a state has adopted some policy, whether or not after a petition by a private party, private parties will be exempt from the antitrust laws only if the state requires some action pursuant to that policy.

[7] In a prior part of the opinion (Part II) Justice Stevens, joined only by three other members of the Court, concluded that *Parker* should be limited to suits against state officials.

none of the Justices questioned the continued validity of *Goldfarb's* requirement—which had been imposed by a unanimous Court—that a private party must first meet the compulsion requirement as a threshold matter.[8]

In our view, the analytical basis for *Golafarb's* compulsion requirement for private parties traces its roots directly to the analysis in *Parker*. The lesson of *Parker* is that the legislative history and wording of the Sherman Act point to the conclusion that Congress wished to restrain the anticompetitive actions of "persons," that is, "individuals and corporations." Thus, an anticompetitive action undertaken by a private party necessarily is proscribed by the Sherman Act unless for some reason that action cannot fairly be attributed to the private party. Under *Goldfarb*, when a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state. The Court elaborated on this freedom of choice analysis in *Cantor* after reviewing Supreme Court cases involving state action immunity:

> In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.

428 U.S. at 593, 96 S.Ct. at 3119. This reasoning also explains the Court's statement in *Parker* that a state may "not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful,"

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[8] The disagreement in the Court centered on what in addition to compulsion was required for state action immunity for private parties. In fact, Justice Stewart, joined by Justices Powell and Rehnquist, argued that Michigan's decision to adopt Detroit Edison's proposal and then compel compliance with it should have been by itself sufficient for state action immunity.

317 U.S. at 351, 63 S.Ct. at 314, and its statement in *Cantor* that "state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity," 428 U.S. at 592-93, 96 S.Ct. at 3118-3119 (footnotes omitted). So long as the state merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Sherman Act. Regardless of how strongly a state may wish to remove private action from the Act's jurisdiction, it will not succeed unless it structures a program so as to make individual actions the actions of the state itself—by means of the mechanism of compulsion.[9]

A necessary corollary of the rationale of *Goldfarb* and *Cantor* is that compulsion should not be required of state defendants. Regardless of their motives for undertaking anticompetitive behavior, states are nevertheless acting as states.[10] Since *Goldfarb*, the Court has consistently pointed out that the analysis of state action differs substantially depending on whether the defendant is a private party or a public institution. *See e.g.*, *Bates*, 433 U.S. at 361, 97 S.Ct. at 2697-2698 (*Cantor* would have been an "entirely different case" had the action been against a public offical or public agency rather than against a private party); *Cantor*, 428 U.S. at 600-601, 96 S.Ct. at 3122-3123 (plurality opinion) (noting that *Parker* might have been different had there been a private defendant); *id.* at

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[9] Another rationale for the compulsion requirement is that if a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time.

[10] We acknowledge that *Bates* and *Parker*, which involved state defendants, discussed the presence of compulsion, but we view those cases—as appellants would have us do—as instances in which the presence of compulsion provides the best evidence of clear articulation and affirmative expression of state policy to displace competition.

585-92, 96 S.Ct. at 3115-3118 (distinguishing *Parker* as case against public officials). The same analysis applies to municipalities, at least when they act as agents of the state. Thus, the Supreme Court has not required compulsion for municipalities, but has held that when a state indicates its intention that the municipality may act as an instrumentality of the state—i.e., when the state "sanctions" anticompetitive behavior of the municipality—a state action defense may be available to the municipality. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413, 98 S.Ct. 1123, 1136-1137, 55 L.Ed.2d 364 (1978) (plurality opinion).

Under the foregoing analysis of the state action doctrine, we have little difficulty in holding that the activities of appellants are not immune from Sherman Act coverage. Specifically, a defense of state action fails because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively.[11]

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[11] The district court found that "regardless of the virtual romance between the states and the ratemaking conferences, no state *requires* that rates be published collectively." 467 F.Supp. at 483 (emphasis in original). An analysis of each state's policies reveals the correctness of the district court's finding. North Carolina General Statute § 62-152.1(b) states that in order to realize and effectuate the policy of uniform rates among carriers, any party to an agreement with other carriers regarding uniform rates may apply to a state commission for approval of the agreement; Section 62-152.1(h) relieves parties to an agreement so approved from the operation of the antitrust laws. The statute does no more than authorize or permit collective ratemaking. There is no compulsion. Tennessee Public Service Commission Rule 1220-2-1.40 adopts Section 5a of the Interstate Commerce Act, 49 U.S.C.A. § 10706(b), which permits carriers to file joint rates and exempts those who do file such rates from the antitrust laws. In addition, Tenn.Code Ann. § 65-1506 permits the Public Service Commission to establish joint ratemaking procedures. Again, there is no state compulsion. Georgia Code Ann. § 68-

Because the anticompetitive practices challenged by the government are undertaken at the individual election of the carriers and the rate bureaus, appellants fail to pass the threshold test established in *Goldfarb*. Thus, appellants' action cannot be said to constitute state action.

Appellants, however, urge that the state action analysis has been changed in their favor by the recent Supreme Court decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminimum, Inc.*, 455 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Midcal* involved a challenge under the Sherman Act to a California statute that required wine producers and wholesalers to file fair trade contracts or price sche-

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613, which requires a state commission to "establish ratemaking procedures for all motor common carriers, which procedure shall include, but not be limited to, collective ratemaking procedures," explicitly indicates that Georgia intends to give carriers the option of filing rates jointly or individually. The State of Georgia, participating as amicus in the district court, presented a 1942 order issued by its public service commission stating that "all for hire motor common carriers operating under Class A certificates be, and they are hereby, directed and required to publish and file with this Commission . . . *a tariff* containing all local and joint class and/or commodity rates applicable between points within Georgia." Pointing to the italicized language, the state argued that the commission "clearly directed all Class 'A' carriers to file a single joint tariff with the Commission," thus indicating its policy in favor of collective action. *Id.* We are not persuaded that the language of the 1942 order is susceptible of only this interpretation. At best it is ambiguous. Given the statute, only recently amended to insert the provisions outlined above, it would not, in any event, be controlling. A 1942 order of the Alabama Public Service Commission requires carriers to "prepare, publish and file with the Commission an individual tariff or . . . participate in an agency issue." As with Georgia, Alabama explicitly permits individual rate applications. Finally, Mississippi in Miss. Code Ann §§ 77-7-1 to -341 merely contemplates cooperation among carriers to the limited extent of establishing "joint rates." This falls short of compelling joint applications for proposed rates.

dules with the state. Under the statute, wholesalers could not resell wine to retailers at prices below those on the contracts or schedules. In order to evaluate whether the state defendant California Department of Alcoholic Beverage Control was state action immune, the Court briefly reviewed several of the state action cases discussed above and then stated that "[t]hese decisions establish two standards for antitrust immunity under *Parker*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the state itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 [98 S.Ct. 1123, 1135, 55 L.Ed.2d 364] (1978) (opinion of Brennan, J.)." 445 U.S. at 105, 100 S.Ct. at 943. California's regulatory system, the Court ruled, met the first standard but not the second; it therefore refused to hold that the state defendant's activity was outside the coverage of the Sherman Act. Applying *Midcal* to the facts in the present case, the government and appellants agree that each state actively supervises the collective ratemaking process,[12] so the second *Midcal* standard is satisfied. As to the first *Midcal* standard, the parties disagree concerning the importance of the fact that none of the five states compels the challenged anticompetitive activity. Appellants assert that, despite the lack of compulsion, their actions meet the first standard. This is because the Supreme Court allegedly abandoned the practice established in *Goldfarb* of requiring compulsion of private parties, as evidenced by the fact that the first standard did not specifically refer to compulsion. We disagree with appellants' argument for several reasons.

Initially, we question the very premise upon which appellants' argument is based—that the specific choice of wording in *Midcal* implies a rejection of a compulsion requirement for

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[12] The government points out that the district court conducted no fact-finding as to this issue. The record, however, reveals that the state commissions conduct hearings to review the reasonableness of proposed carrier tariffs and routinely suspend their effectiveness.

private parties. In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit. Our interpretation of the disputed passage in *Midcal* is that it should be read as a broad, general restatement of the Court's earlier holdings; the absence of any mention of compulsion in one specific application of the standard—that is, to private parties—therefore does not strike us as unusual. One additional factor points to the conclusion that the Court's choice of wording in *Midcal* does not imply a rejection of its prior holdings. The Court introduced the two standards with the statement that the prior decisions "establish" the standards, 445 U.S. at 105, 100 S.Ct. at 943, thus indicating that it did not view them as anything new. Furthermore, the Court used similar or identical language in earlier cases. *See New Motor Vehicle Bd.*, 439 U.S. at 109, 99 S.Ct. at 411-412; *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135 (plurality opinion); *Bates*, 433 U.S. at 362, 97 S.Ct. at 2698. If these cases did not alter the standard for state action immunity for private parties, we see no reason to believe that *Midcal* did.

Our interpretation of *Midcal* is supported by the consideration that that case had nothing to do with the applicability of a state action defense to a private party. *Midcal* involved an action by a wholesale distributor of wine for a writ of mandate for an injunction against the Califoria Department of Alcholic Beverage Control—a state agency.[13] Because, as we said earlier, *Parker* immunity for state defendants does not require compulsion, it makes sense that the Court did not require compulsion of the state Department.[14] Moreover, because the

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[13] In the Supreme Court, petitioner California Retail Liquor Dealers Association had appealed the case as an intervenor.

[14] In any event, compulsion was in fact present in *Midcal*. *See* 445 U.S. at 100, 100 S.Ct. at 940.

Court's holding against state action immunity in *Midcal* was grounded on the fact that the second standard, requiring active state supervision, was lacking, it is not surprising that the Court did not articulate a standard designed to encompass every conceivable state action case. The Court's citation to *City of Lafayette*—a non-private party case—immediately after listing the two standards further evidences that the Court's focus was only on cases involving public defendants. The Supreme Court recently agreed with our reading of this passage, referring to *Midcal* as having adopted the principle "that anticompetitive restraints *engaged in by the state municipalities or subdivisions* must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption. *Midcal*, 436 U.S. at 105 [100 S.Ct. at 943]." *Community Communications Co.*, 455 U.S. at 51 n. 14, 102 S.Ct. at 841 n. 14 (emphasis added). The fact remains that the only two state action cases in the Supreme Court to date involving private defendants have applied the threshold compulsion requirement.[15]

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[15] Appellants cite several lower court cases in support of their position, but only two of them actually found that private parties were immune without compulsion by the state. The first, *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F.Supp. 711 (D.D.C.1979), *aff'd per curiam*, No. 79-1658 (D.C.Cir. 1980), *cert. denied*, 450 U.S. 914, 101 S.Ct. 1355, 67 L.Ed.2d 339 (1981), a district court opinion, is of only limited relevance because in that case the court reviewed a governmental restraint involving a private party (and a state defendant) rather than, as here, a private restraint approved by the government. In the second case, *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982), in which the Ninth Circuit reviewed an antitrust challenge to a private agreement allocating horse racing dates between two race track operators, the state had by statute specifically reserved the right to perform the allocation in the event that the private parties could not agree. *Id.* at 816. Thus, although the state did not compel the private parties to enter into the racing date agreement, it had effectively ensured that the anticompetitive conduct would occur one way or another.

Appellants suggest that their view of the state action doctrine does not really constitute a significant change from prior law, arguing that *Goldfarb* would have come out the same way under their reading of *Midcal* because in *Goldfarb* the minimum fee schedule lacked even state authorization. Such speculation, however, ignores the fact that the Supreme Court in *Goldfarb* could not possibly have been more clear in imposing a compulsion requirement on private parties. The very basis of the Court's holding was that compulsion was lacking; having made that determination, the Court reached no other issues, including whether the state had authorized the bar association's action. More importantly, reading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*. Under the view of federalism espoused in *Parker* and followed in *Goldfarb* and *Cantor*, the Court's inquiry focuses on the wording and intent of the Sherman Act in determining whether private action is mere obedience to a state command and therefore effectively the action of the state itself. Under appellants' view of federalism, on the other hand, Congress' explicit legislative determination to reach the conduct of "individuals and corporations" may be overridden by a state's decision to implement a voluntary supervision scheme that permits but does not compel anticompetitive behavior.[16] Even if such a

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[16] Appellants reason that the Court eliminated the compulsion requirement because the basis for state compulsion is the concern that the economic self interest of private parties might affect the rate setting process and, according to appellants, the second standard in *Midcal*—the requirement of state supervision—assuages that concern. They assert that a supervision requirement adequately ensures that the state has determined that the challenged activity is in furtherance of the state's policy and that the state does not abdicate its responsibility to private parties. We disagree with this analysis. If the second *Midcal* standard accomplished as much as appellants claimed, there would have been no need for the first standard. Further, if compulsion and supervision served the same purpose, the

view of federal-state relations could be supported, its adoption would require at least some explanation or discussion. In *Midcal* there was none. Additionally, appellants' view of state action for private parties would raise extremely difficult practical questions of interpretation and application. For example, appellants presumably do not dispute the continued validity of the Court's statement in *Cantor* in 1976 that state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity. *See* 428 U.S. at 592-93, 96 S.Ct. at 3118-3119. Yet appellants' interpretation of *Midcal* would have us find antitrust immunity where a state grants private parties the option of participating in a scheme of state supervision. If there is a significant difference between these two schemes, it eludes us. Thus, in light of the significant theoretical and practical difficulties that a reformulation in state action doctrine would create, we are not inclined to infer such a reformulation from a Supreme Court opinion which is completely silent on the subject.

Supreme Court would have upheld, rather than denied, state action immunity in *Midcal* because compulsion was present in that case. *See* 445 U.S. at 99-100, 100 S.Ct. at 940-941. That the Court did not reach this result is evidence that supervision and compulsion serve different purposes. In our view, both supervision and compulsion are necessary for a finding of state action. A state cannot deprive competitors of their ability to subvert competition merely by compelling them to formulate collective rates. Conversely, active supervision of anticompetitive conduct undertaken at the voluntary election of a private party also is not by itself adequate. For example, a state may by regulation supervise the reasonableness of rates, but the reasonableness of any particular rate may have little to do with whether it was arrived at anticompetitively. A state regulatory system does not even necessarily have the regulatory power to supervise anticompetitive behavior if the resulting rate falls somewhere within the zone of reasonableness. As we stated earlier, compulsion serves an entirely different purpose from supervision: as *Goldfarb* and *Parker* established, the compulsion inquiry is to determine whether the specific anticompetitive activity at issue was actually that of the state acting as sovereign.

The final reason why we conclude that *Midcal* does not represent a rejection of a compulsion requirement for private parties is found in the language of the opinion itself. The Court chose to cite *Goldfarb* with approval, and even quoted from it to the effect that "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities *must be compelled* by direction of the State acting as a sovereign." 445 U.S. at 104, 100 S.Ct. at 943 (quoting 421 U.S. at 791, 95 S.Ct. at 2015) (emphasis added). Moreover, in a footnote immediately after setting out the two standards for state action immunity applicable to that case, the Court cited a student note in which the only argument contained at the cited page was that private action must be compelled by the state in order for the private party to invoke state action immunity.[17]

In addition to arguing that *Midcal* represents a rejection of a compulsion requirement for private parties, appellants also rely on various policy arguments against affirming the judg-

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[17] The mere fact that anticompetitive conduct by a private party effectuates a clearly articulated state regulatory policy is not in itself sufficient to justify a state action defense against injunctive relief. The defense is only available if the state has elected to effectuate its policy by *requiring* the private conduct under attack.

Note, *Parker* v. *Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 Colum.L.Rev. 898, 916 (1977) (emphasis in original). The Note at the end of the relevant section was even more definite. "To summarize, a state action defense against injunctive relief should be available for private conduct only if the state has specifically required the conduct in question without abdicating final decisionmaking authority to private parties." *Id.* at 918.

The same footnote in the *Midcal* opinion also cited *Norman's on the Waterfront, Inc.* v. *Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971), and *Asheville Tobacco Bd.* v. *FTC*, 263 F.2d 502, 509-10 (4th Cir. 1959), in which state action defenses were refused. Although both cases are ambiguous as to the requirements for state action, neither one implies that compulsion is not necessary for private parties.

ment of the district court. Even if we were not bound by the Supreme Court's decisions in *Goldfarb* and *Cantor*, we would find these arguments unpersuasive.

Appellants argue first that competition is undermined by a state action requirement that allows states to eliminate competition completely but not to maintain a policy that gives parties the choice of whether or not to compete. But the rationale of the state action doctrine is federalism, not the maximization of competition. As we stated earlier, it is the source of the decision not to compete—not the extent of competition—which determines whether state action exists.[18] Unless it is the state rather than the individual or corporation that decides to act anticompetitively, a state action defense would be inconsistent with the wording and intent of the Sherman Act.

Appellants also urge that if we uphold the injunction against collective ratemaking and require competition among carriers, carriers will face the burden of additional expense in preparing individual rate filings. They also assert that the ability of state regulators to perform their task will be undermined. Even if these assertions were supported in the record,[19] they would be irrelevant to proper antitrust analysis. Appellants' objections amount to the argument that competition does not work well, so the antitrust laws should not apply. This argument has consistently been rejected by the Supreme Court. *See Nation-*

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[18] Thus, a state may exempt a specific subclass of carriers from regulation or, as in *Parker*, it may predetermine a set amount or type of activity that may remain in the free market. In both of these cases, the state controls and sets the terms of the individual decision as to whether to compete. But where the option to compete or join a system of state regulation at all is up to the private party, state action does not exist.

[19] We note that the government did not seek to enjoin the rate bureaus from performing joint rate studies or from undertaking joint publication of individual rates and agreements involving two or more parties who provide joint service.

al Society of Professional Engineers v. *United States*, 436 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22, 60 S.Ct. 811, 842-843, 84 L.Ed. 1129 (1940). Moreover, if collective ratemaking is as desirable as appellants insist, then it should be but a small step for the states to compel it of all carriers. This latter point underscores a critical element of the state action issue. Congress has instructed courts not to treat lightly overt collusion by private parties in setting prices. Permitting states to confer antitrust immunity on private parties who voluntarily elect state regulation would, in our view, open the way for the creation of large loopholes in federal antitrust law, loopholes shows contours would be difficult to contain. If a state wishes to displace federal antitrust laws, it should be permitted to do so only if it speaks in the clearest and strongest possible terms—by compelling private parties to submit to its own regulatory system.

For the reasons stated above, we conclude that the district court properly decided that appellants were not entitled to claim state action immunity. On application for rehearing en banc appellants suggest no fault with the panel's determination that the Sherman Act was violated or that the *Noerr-Pennington* doctrine does not apply to the challenged activities. Accordingly, we reinstate that part of the panel opinion dealing with these issues, 672 F.2d 469, 476-81 (5th Cir. 1982)[20] and AFFIRM the judgment of the district court.

JAMES C. HILL, Circuit Judge, with whom R. LANIER ANDERSON, III, and THOMAS A. CLARK, Circuit Judges, join dissenting.

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[20] We also agree with the panel's determination that there is no implied immunity from the antitrust laws resulting from the antitrust exemption granted motor carriers under 49 U.S.C.A. § 10706, or from the existence of pervasive state regulation permitted by 49 U.S.C.A. § 10521(b). *See* 672 F.2d at 475 n.9.

Once again, I respectfully dissent from the court's ruling that compulsion is an essential element of state action immunity when a state action defense is raised by a private defendant. I write not to profess great admiration for the existence of a state action exemption to federal antitrust laws, but rather to uphold what the Supreme Court has clearly articulated to be the status of the law in this area. The majority view that the Supreme Court could not possibly have meant what it said in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), seems presumptuous at worst, and unsound policy as it pertains to the facts of this case at best. The *Midcal* test is clear and explicit. It should not be ignored simply because a different conclusion can be reached by reexamining the same line of cases already analyzed by the Supreme Court. In addition, the arbitrary nature of the compulsion requirement imposed by the majority today will significantly interfere with state trucking regulation. Like the federal government, the states interested in this litigation have adopted a sound program of regulation which embraces both the cost benefits of collective ratemaking and the added measure of competition that is preserved by permitting individual rate submissions. A compulsion requirement, as defined by the court, precludes such regulation—no matter how clearly the state's policy may be expressed and supervised.

The principal flaw in the majority's position is not that it misinterprets the line of cases developing the doctrine of state action immunity. The court's analysis leading to its conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible. However, the Supreme Court reached a different conclusion after examining the same line of cases, and the structure of the federal court system demands that we adhere to its ruling.

After reviewing the state action cases commencing with *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court set forth two standards for determining when the state's involvement is sufficient to jus-

tify immunity for the challenged conduct. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (citing *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.)). In reaching this conclusion, the Court did not limit its analysis to those cases involving only state defendants, but instead examined all of its major decisions construing the state action exemption. The Court began its analysis for focusing on the state's involvement in the challenged restraint in light of the fact "[t]hat immunity for state regulatory programs is grounded in our federal structure." 445 U.S. at 103, 100 S.Ct. at 942. *Parker*, it argued, "found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against 'individual and not state action,' . . . state regulatory programs could not violate it." *Midcal*, 445 U.S. at 104, 100 S.Ct. at 942 (construing *Parker*, 317 U.S. at 352, 63 S.Ct. at 314).

Using *Parker* as its foundation, the Court went on to evaluate several recent decisions applying *Parker's* analysis. The line of cases discussed in this portion of *Midcal* include those involving private defendants, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), as well as those involving governmental defendants, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). After discussing each of these cases, a *unanimous* Court concluded that "[t]hese decisions establish two standards for antitrust immunity under *Parker* v. *Brown*," and proceeded to enunciate the two-part test set forth above. 445 U.S. at 105, 100 S.Ct. at 943. The Court did not purport to restrict application of its test to governmental entities; nor did it purport to derive the substance of its test from those cases involving governmental defendants. Indeed, as evidenced by

the facts of the present case, to have drawn such a distinction on the basis of the identity of the defendant would have proven unreasonable and inconsistent with the federalism concerns underlying the doctrine.

When a state enacts a regulatory scheme characterized by a clearly articulated state policy and active and effective supervision over implementation of that policy, but its policy is that of permissive joint ratemaking, the state's policy will be undermined whether governmental entities or private participants are the subject of the lawsuit; few private companies will be foolish enough to participate in valid and constructive state programs when such participation is clouded by the threat of antitrust liability.[1] As Justice Stewart noted in *Cantor*,

> If *Parker* v. *Brown* . . . could be circumvented by the simple expedient of suing the private party against whom the State's "anticompetitive" command runs, then that

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[1] There may be substantive limits on what conduct the state may immunize by making the challenged restraint a state policy. Indeed, there is some suggestion in Supreme Court precedent that federal antitrust laws do place substantive limits on the content of state economic regulation. *See, e.g., Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (invalidating a Louisiana fair trade statute containing a "non-signer" provision under which a retailer could be enjoined from knowingly underselling another retailer whose prices were set under a resale price maintenance contract, exempt from antitrust laws under the Miller-Tydings Act, with a supplier). *But see* P. Areeda & D. Turner, *Antitrust Law* ¶ 212 at 70 (1978) (interpreting this decision as an inadequate supervision case). *See generally* Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L.Rev. 693 (1974). These limits may be reached in areas that have not been traditionally regulated by states.

Here, however, the states are involved in a type of private utility regulation. The ability to regulate motor carriers involved in intrastate activites not only is a traditional state regulatory function, but also is an authority conferred on the states by the Congress. 49 U.S.C.A. § 10521(b) (West Supp.1982).

> holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

Cantor, 428 U.S. at 616-17 n. 4, 96 S.Ct. at 3130 n. 4 (Stewart, J., dissenting). *Cf. id.* at 604, 96 S.Ct. at 3124 (Burger, C.J., concurring)(for *Parker* purposes, focus should be "on the challenged *activity*, not upon the identity of the *parties* to the suit."); *City of Lafayette*, 435 U.S. at 420, 98 S.Ct. at 1140 (Burger, C.J., concurring in part and dissenting in part) (same). "The *Parker* state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principal that States posses a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 842, 70 L.Ed.2d 810 (1982); *see also Parker*, 317 U.S. at 351, 63 S.Ct. at 313-314.[2] That sovereignty is subverted when federal law prohibits private companies from participating in well-developed and actively supervised state programs.

Unlike an arbitrary compulsion requirement, the *Midcal* test affords states greater flexibility in the formation of constructive regulatory programs so long as the state clearly and affirmatively expresses its intent to do so and remains continuously and actively involved. *Midcal* demands a very high degree of state involvement before state action immunity may be claimed. The Court did not purport to expand application of the doctrine, or to overrule *Goldfarb*. Instead, *Midcal* simply clarifies that the focus for immunity purposes should be upon

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[2] In *Parker* the Court concluded that "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351, 63 S.Ct. at 313. The state action doctrine therefore was enacted to effectuate Congressional intent that state restraints on competition would not be prohibited. However, "[t]here is nothing to indicate that the Congress of 1890 intended to leave state-compelled restraints intact but to subject state-authorized restraints to antitrust." M. Handler, *Reforming Antitrust Laws* 64-65 (1982).

the extent of the state's involvement in the challenged activity—that is upon the kind of imprint of state authority the anticompetitive activity bears. Compulsion certainly remains a relevant factor in this determination. Indeed, it is the best evidence that a challenged restraint is a "clearly articulated and affirmatively expressed" state policy. As Professor Areeda has observed, after *Midcal*, "literal compulsion is powerful evidence, if not determinative, of the existence of state policy, but is neither necessary nor sufficient for *Parker* immunity." P. Areeda, *Antitrust Law* ¶ 212.5 at 62 (Supp.1982); *see also Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir.) *cert. denied*,— U.S. ____, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). *See generally* M. Handler, *Reforming Antitrust Laws* 64-65 (1982); Page, *Antitrust, Federalism, and the Regulatory Process: A reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U.L.Rev. 1099, 1122 n. 141 (1981).

Nevertheless, the majority insists that compulsion must be the litmus test for the first prong of *Midcal* for a nongovernmental defendant. It relies primarily upon the fact that *Midcal* did not expressly overrule the compulsion language in *Goldfarb*. Admittedly, *Goldfarb* does suggest that as the state action exemption was developing the Supreme Court anticipated that some type of compulsion might be incorporated into the doctrine.[3] The Court's early references to compulsion,

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[3] At least one commentator has suggested that "[t]he compulsion requirement was an overreaction to the facts presented in *Goldfarb*, where the conduct challenged was actually contrary to the pronouncements of the state, and in *Cantor*, where the state agency never addressed the practice involved in any meaningful manner." M. Handler, *supra* at 64. Professor Areeda also agrees with this assessment.

> Indeed, *Goldfarb* and *Cantor* may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct. In *Goldfarb*, the defendants were private groups enforcing fee schedules without adequate state authority

however, were ill-defined and were not restricted to cases involving private defendants. As noted in footnote ten of the majority's opinion, compulsion was discussed in both *Bates* and *Parker* wherein governmental defendants were the subject of antitrust scrutiny. Scholars and lower courts also were uncertain about the nature of the compulsion requirement and whether it was a requirement at all.[4] In *Midcal*, however, the Supreme Court reviewed its earlier treatment of compulsion, and concluded that the state action doctrine had developed to the point where a single test could provide the necessary analysis and satisfy the concerns articulated in *Goldfarb*. Thus, as the Ninth Circuit already has observed, "It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervsion by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015." *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2038, 73 L.Ed. 2d 1308 (1982).

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or supervision. The essence of *Cantor* was the state's presumed indifference to the utility's "free" light bulb program; state approval, even if deliberate, was not intended to displace the antitrust laws.

Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv.L.Rev. 435, 439 n. 19 (1981).

[4] Prior to *Midcal*, Professors Areeda and Turner observed that the precise meaning of the compulsion test and its role in determining immunity was left unclear by *Goldfarb* and *Cantor*. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 215 at 93 (1978); *accord Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F.Supp. 711, 724-25 (D.D.C.1979). Thus, they proposed that two requirements were essential to sustain a defense of state action immunity: "(1) adequate public supervision and (2) a clear state purpose to displace antitrust law." Areeda & Turner, *supra*, ¶ 212 at 71. The similarity between this proposal and the test eventually adopted in *Midcal* suggests that the Court perceived the reasonableness of dropping its earlier compulsion languages and adopting a simple and clear rule of general applicability.

Clearly, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351, 63 S.Ct. at 314. The Court in *Midcal* recognized this limitation on state action immunity, 445 U.S. at 106, 100 S.Ct. at 943-944, and thus formulated a test which examines the extent of the state's involvement at two levels—first, at the level of articulation of state policy in favor of the challenged restraint and second, at the level of implementation of that policy through active supervision. Significant involvement at both levels is necessary to support a state action exemption. And it is the combination of these two criteria that effectively guarantees that the state has considered the course of its conduct and has chosen to replace open market pricing with state regulation. Hence, the balance struck in *Midcal* between the federal policy of competition and state sovereignty is thus: the state may choose to displace competition with economic regulation by making clear its intention to do so; having made that choice, however, the state bears the burden of ensuring that this policy is furthered and that the state itself remains the ultimate decision maker.

The Court's recent decision of *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), amply illustrates the degree of directness and clarity necessary to satisfy the first prong of *Midcal*. In *Boulder*, the Court ruled that because the State's constitutional delegation of home rule authority to municipalities was not a "clear articulation and affirmative expression" of state policy in the area of cable television, a city's cable television moratorium was not afforded state action immunity. 102 S.Ct. at 843. In other words, when a home rule provision was added to Colorado's constitution, the state could not foresee that it was expressly authorizing a cable television moratorium. *Boulder* therefore can be fairly read to stand for the proposition that the state must be fully aware of what it is doing when it articulates and affirmatively expresses its policy to supplant open market competition. *Boulder* also is signifi-

cant because a majority of the Court appears to have ruled that "a municipality may invoke the *Parker* doctrine only to the same extent as can a private litigant." 102 S.Ct. at 850 (Rehnquist, J., dissenting); *accord* M. Handler, *supra*, at 64 ("*Boulder*, however, indicates that municipalities enjoy no more liberal a standard of immunity than private parties.").

The majority, however, would adhere to the position that the only way a state can articulate a clear and express policy (when a private defendant is sued) is by compelling all carriers to engage in collective ratemaking. Thus, the court maintains that if a motor carrier is permitted to join in the development and submission of joint rates through the bureaus, at its election, such a program cannot be a clearly and affirmatively expressed state policy. Initially, it seems clear that a state can articulate clearly a policy which incorporates both the benefits of joint ratemaking and separate filings. Indeed, such a policy of permissive joint ratemaking may be far superior to the complete mandatory joint ratemaking suggested by the majority. As the district court suggested, rate bureaus provide important support services to state regulatory bodies such as the staff experts and facilities necessary to collate data for the preparation of cost studies. *See United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476 (N.D.Ga. 1979). *See generally* H.R.Rep. No. 1100, 80th Cong., 1st Sess. (1947). However, individual rate submissions also provide an important check on rate bureaus and preserve a certain degree of competition. For example, if an individual rate submission is significantly lower than a bureau rate proposal, the regulatory body is alerted to possible abuse of the privilege of collective ratemaking, and is better able to enforce and supervise its program than if there is no possibility of an individual rate proposal.

The irony of this litigation is that the Government seeks to enjoin states from implementing a transportation policy which parallels our national transportation policy. Federal law regulating interstate motor carriers adopts a policy of permissive joint ratemaking, and if a carrier chooses to participate in

government approved collective ratemaking it is expressly exempt from antitrust liability. 49 U.S.C.A. § 10706(b)(2) (West Supp. 1982), former 49 U.S.C.A. § 5(b) (1959). Drafters of the original federal exemption for collective interstate ratemaking, upon which North Carolina's law is modeled, stated the following with respect to the conflict between the antitrust laws and national transportation policy:

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder and the basic purposes of the Act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent . . . . It is obvious that confusion and uncertainty are inevitable where these two principles of public policy [antitrust laws and national transportation policy], administered and enforced by different agencies, are applied in such a way that there is conflict between them.

H.Rep. No. 1100, 80th Cong., 1st Sess. 4-5 (1947); S.Rep. No. 44, 80th Cong., 1st Sess. 3-4 (1947). Although there have been modifications of the statutory exemption for interstate carriers engaged in collective ratemaking, and there are those who would disagree with the current status of the federal regulatory framework, few would seriously argue that the federal government had not clearly articulated and affirmatively expressed a national transportation policy of permissive joint ratemaking.

Further evidence of a state articulation of state policy is the fact that all rates are closely supervised by the state.[5] This also

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[5] While we treat these as separate requirements, we nevertheless want to stress their interrelationship. The existence of state supervision over anticompetitive behavior *may*, for example, indicate the requisite state intent as well. Similarly, inaction on the part of the state may both represent a failure of supervision and reflect an ambiguous state purpose. 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 212 at 71 (1978).

illustrates the importance of satisfying both prongs of the *Midcal* test, for together they satisfy the function served by the *Goldfarb* formulation. The active supervision requirement is essential to the *Midcal* test because it inhibits the influence of economic self interest of the companies involved in the rate setting process. Such private self interest does not warrant the cloak of state action immunity. But, by requiring that a state actively supervise implementation of its economic policy, the *Midcal* test ensures that the state has determined that the challenged activity is in furtherance of the state's policy. When the state ceases to be the real party in interest, the sovereignty of the state cannot be said to be impaired by withholding state action immunity.[6] But when the state is the real party in interest, its continuous and active supervision evidences its intent to impose state regulation in lieu of open market competition, and withholding antitrust immunity does impair state sovereignty.

Because it is the requirement of active supervision which deters abuse of joint ratemaking procedures, if any distinction is to be drawn between public and private defendants, it should be in the amount of supervision deemed necessary to satisfy this portion of the *Midcal* test. It makes no sense to require compulsion for private and not public defendants when in both instances the same state policy will be thwarted by the threat

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[6] The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market.

1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213 at 73 (1978) (footnotes omitted).

of antitrust liability. Looking to the degree of active supervision, on the other hand, may be more relevant in a suit against a private defendant because it is possible that abuse of the state system may be an issue.[7] Nevertheless, because the Government does not challenge the adequacy of any state's supervision in the present case, there is no reason to draw this distinction.

The only issue in this case, therefore, is whether the individual states involved clearly articulated and affirmatively expressed state policy in favor of permissive ratemaking. As set forth in my original dissent, I think it clear that the states of North Carolina, Tennessee and Georgia have such a policy. Nevertheless, because the district court entered a final judgment before the Supreme Court's pronouncements in *Midcal*, I would remand the case for further development of the factual record and for evaluation under the *Midcal* test.

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[7] Professor Areeda has even suggested that *Midcal's* active supervision requirement may be inapplicable to governmental defendants. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 445 n. 50 (1981) ("A few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active supervision of *private* parties) to require state supervision of governmental defendants.") In *Community Communications Co.* v. *City of Boulder*, however, the Supreme Court expressly declined to decide whether the active supervision criterion must be met by a municipality with respect to the challenged ordinance. 102 S.Ct. 835, 841 n. 14 (1982).

THOMAS A. CLARK, Circuit Judge, with whom RONEY, Circuit Judge, joins dissenting:

I concur in Judge Hill's dissent and his thorough analysis of *Midcal* which demonstrates that compulsion is not a prerequisite for application of the state action exception.

Differing interpretations of Supreme Court opinions are not uncommon. What disturbs me so deeply about the majority opinion is that it completely ignores the Interstate Commerce Act, public policy, history, and fairness. As pointed out by Judge Hill, the functions of rate bureaus or conferences declared illegal by the majority have been accepted national policy for more than thiry years. These same defendants have performed the identical functions[1] for interstate carriers whose rates are fixed by the Interstate Commerce Commission. These functions, when performed by these bureaus for interstate carriers are exempted from the Antitrust Act by the Interstate Commerce Act:

> As provided by this subsection, a motor common carrier of property providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them . . . . If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.
>
> 49 U.S.C.A. § 10706(b)(2).

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[1] Described in the majority opinion, slip op. at 15988, at ____.

The states involved here likewise permit joint filings of rates by carriers through the medium of a bureau or conference, and permit individual carriers to file their own rates. Thus, not all carriers are compelled to file rates through a conference or bureau. The majority holds that if a state compelled uniform action by the carriers, such a state statute would meet the *Parker* v. *Brown* requirement of state action and joint action would be exempt from the antitrust statute. Again, I turn to the Interstate Commerce Act and find that the national act forbids exclusive rate-fixing in the following manner:

> (2) The Commission may not approve an agreement under this section—
>
> * * * * * *
>
> (C) establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure.

49 U.S.C.A. § 10706(d)(2). Thus, as can be seen, the Commission does not compel carriers to participate in the agreement. The state statutes are patterned very much after the national act, permitting joint action through the bureaus and conferences, but also permitting individual action.

By way of hypothecation, Southern Motor Carriers Rate Conference, Inc. may file with the Interstate Commerce Commission rates for the carriage of carpeting from Rome, Georgia, to Nashville, Tennessee. That same Conference may perform the identical function for the intrastate carriage of carpeting from Rome to Macon, Georgia, approximately the same distance. This has been done for three decades prior to the filing of this action in 1976. It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 79-3741

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
Defendants-Appellants.

Appeal From The United States District Court
For The Northern District Of Georgia

COURT OF APPEALS
ELEVENTH CIRCUIT

FILED
MAY 6, 1983

NORMAN E. ZOLLER
CLERK

ORDER:

( ) The motion of appellant, Southern Motor Carriers Rate Conference, Inc., *et al.*, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of appellants, Southern Motor Carriers Rate Conference, Inc., *et al.*, for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 30, 1983,

the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Franklin Johnson, Jr.
FRANKLIN JOHNSON, JR.
UNITED STATES CIRCUIT JUDGE

6214

No. 82-1922

Office - Supreme Court, U.S.
FILED
JUN 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

October Term, 1982

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF SOUTHERN COMPANY SERVICES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 82-1922

IN THE

Supreme Court Of The United States

October Term, 1982

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF SOUTHERN COMPANY SERVICES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Southern Company Services, Inc. submits herewith its brief as *amicus curiae* in support of the petition for certiorari filed jointly by Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., and the National Association of Regulatory Utility Commissioners ("Petitioners") seeking review of the decisions of the United States Court of Appeals for the Fifth

Circuit in *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (Unit B *en banc*), and *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982) (Unit B). Pursuant to Rule 36 of this Court, the written consents of counsel for the parties have been obtained and are on file with this Court.

INTEREST OF AMICUS CURIAE

Southern Company Services, Inc. submits this brief in its capacity as agent for its electric utility operating company affiliates — Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (hereinafter collectively "Southern Utilities").[1] These affiliates retail electric service in the States of Alabama, Georgia, Florida, and Mississippi, respectively. Each of the Southern Utilities is subject to the comprehensive regulation and supervision of the appropriate state public service commission. The Southern Utilities do not engage in collective ratemaking, but as electric utilities subject to state regulatory jurisdiction, are concerned with the broader implications of the decisions below for the *Noerr-Pennington* and state action doctrines. The Southern Utilities believe certiorari should be granted in this case because of the risk that the decisions below would unduly chill the ability of utility operating companies to propose rate and service arrangements to their respective state public service commissions, and would unduly restrict the ability of states to structure the means by which intrastate utility service and

[1]Southern Company Services, Inc. is a subsidiary of The Southern Company, a holding company organized pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6. The Southern Company owns the common stock of the Southern Utilities, and Southern Company Services, Inc. provides technical engineering expertise and other services pursuant to Section 13 of the Public Utility Holding Company Act, whenever one of the affiliates so requests.

rates are determined in accordance with the states' interest in controlling the price and service of businesses affected with a public interest.

SUMMARY OF ARGUMENT

The Southern Utilities concur with the reasons for granting the writ identified by Petitioners and wish to emphasize two especially important reasons for granting the writ. First, the Court of Appeals adopted an extremely restrictive construction of the *Noerr-Pennington* doctrine which fails to recognize the public importance of First Amendment freedoms in the context of state regulation of public service corporations and which conflicts with the construction adopted by the Court of Appeals for the Third Circuit. Second, the restrictive application of the state action doctrine adopted by the Court of Appeals unduly limits the ability of states to structure the manner in which the price and output of intrastate carrier and utility services are determined and depends on a "bright line" test which is wholly inappropriate given the importance and complexity of state regulatory interests.

ARGUMENT

A. The Court of Appeals Adopted An Extremely Restrictive Application of the Noerr-Pennington Doctrine, Which Conflicts With That of The Court of Appeals For The Third Circuit.

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court limited the scope of the prohibition of restraints of trade in Section One of the Sherman Act and reaffirmed the protections extended to the First Amendment freedoms of speech, association and petition by holding that bona fide applications

seeking government action are exempt from the Sherman Act notwithstanding their anticompetitive purposes or effects. The decisions below sharply restrict the application of the *Noerr-Pennington* doctrine by excluding actions taken in preparation for a petition for government action.

In considering whether to grant the writ, it is important that the Court realize that public service companies, in formulating and presenting rate and service proposals to regulatory bodies, are engaging in activities of more significance than the commercial speech involved. Because a public service company's service rights, obligations, exercise of public powers, and pricing are all subject to the will of the state, such activities are at the core of central First Amendment freedoms, especially the right to petition.

> The concept of a public service company may be simply stated. A private business firm, financed by private capital and managed by private individuals, engages in commercial activities subject to distinct public constraints. These constraints are normally administered by a government agency that supervises the availability and quality of the firm's services, and a number of ancillary matters, including the firm's financial practices, its relation with other public service companies and mergers and other major corporate changes.
>
> The core of the concept is that the public service company will make its services available on fair and equitable terms to all customers in the area it undertakes to serve. In exchange, the company will be permitted to charge prices high enough to cover the legitimate costs of conducting its regulated activities, including an appropriate return on its investment.

W. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States,* 79 Colum.L. Rev. 426, 426-27 (1979). Public service company regulation is inextricably intertwined with public policy decisions

of the broadest importance and the ongoing political life of the state in question. *See, e.g.*, A. Bolla, *Centennial of the Alabama Public Service Commission: An Historical Commentary on Its Rate Regulation Powers*, 11 Cumb.L.Rev. 585, 595 (1980-81) (Alabama Commission's ratemaking is "of paramount interest to the public"); *108th Report of Georgia Public Service Commission* (1980) (Georgia Commission held 479 public hearings in 1980). Accordingly, the formulation and presentation of public service company rate and service proposals are entitled to the full scope of First Amendment protection.

The Fifth Circuit recognized the propriety of according First Amendment protection to joint petitions to the public ratemaking bodies in accordance with the *Noerr-Pennington* doctrine. But the court drew a line against extending the protection:

> While the joint efforts of the bureaus to secure legislation or commission regulation permitting collective ratemaking procedures would clearly fall within the ambit of *Noerr* protection, inasmuch as it would seek to influence policy, collective action to determine the rates which the bureaus desire the commission to approve is not of the same genre.

672 F.2d at 477.

The Fifth Circuit's only stated reason for not applying *Noerr-Pennington* to the rate conferences' activities was that "[t]his case is not one to which *Noerr-Pennington* has traditionally been applied. *Noerr* and its progeny have all involved concerted attempts to obtain governmental interference with a competitor. The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors." 672 F.2d at 477 (quoting *U.S. v. Southern Motor Carriers Rate Conference*, 467 F.Supp. 471, 484-85 (N.D. Ga. 1979)). The court thus

deemed collective rate formulation to be outside the scope of the First Amendment despite recognizing that the collective presentation of proposed rates to the regulator is protected.

This holding gives inadequate protection to Petitioners' rights of association. The narrow distinction between the formulation of an application to be placed before a government body and the application itself is inconsistent with the broad protections properly accorded the rights of petition and association. Restriction of the latter right of association "undeniably" diminishes the right of speech and petition. *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *accord*, *NAACP v. Claiborne Hardware Co.*, 102 S.Ct. 3409 (1982); *Citizens Against Rent Control v. City of Berkley*, 454 U.S. 290 (1981). The holding below also conflicts with the decision of the Third Circuit.

In *Horsemen's Benevolent & Protective Assn. v. Pennsylvania Horse Racing Comm'n.*, 530 F.Supp. 1098 (E.D. Pa.), *aff'd w/o opinion*, 688 F.2d 821 (3d Cir. 1982), the plaintiff alleged that the members of the Jockey Guild had violated Section One of the Sherman Act by combining together to decide upon an appropriate fee schedule for jockeys in Pennsylvania and presenting it to the state horse racing commission, which adopted the schedule exactly as proposed. The district court dismissed the complaint, and the Third Circuit affirmed.

> The *Noerr-Pennington* doctrine is applicable here. The members of the Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission. Since the law permits them to do this, it follows that they must be permitted to confer and to agree upon the fees they wish to propose.

530 F.Supp. at 1110 (citing *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 485 (N.D. Ga. 1979)).[2] The conflict is ironic because the two courts rely on the same formulation of the *Noerr-Pennington* doctrine by the *Motor Carriers* district court to reach opposite conclusions with the incongruous result that greater protection is afforded to horse racing than to public service activities. The fundamental First Amendment values underlying the *Noerr-Pennington* doctrine make it vital that this Court grant the writ to resolve the Third and Fifth Circuits' disagreement over the scope of the doctrine, or at least to recognize that a broad *Noerr-Pennington* protection is appropriate where public service obligations are in issue.

B. The Restrictive Application of the State Action Doctrine Adopted By The Court of Appeals Fails to Recognize Critical State Interests in Structuring the Determination of Intrastate Carrier and Utility Rates and Services.

Virtually every state, including those in which the Southern Utilities operate, *see, Ala. Code* §§ 37-1-31 *et seq.*; 37-3-11, 19 (1975); *O.C. Ga. Ann.* §§ 46-2-20 (a) - (b), 46-3-1 *et seq.*, 46-2-25, 36-7-18 (1982); *Fla. Stat. Ann.* § 366.05 (1980

---

[2] The Fifth Circuit's determination that state compulsion of private anti-competitive conduct is a threshold requirement for the application of the state action immunity doctrine also conflicts with the Third Circuit's affirmance of *HBPA*. The district court dismissed the complaint against the racing commission itself despite the lack of any contention that the jockeys' collective decision to petition for a revised fee schedule was in any sense compelled or even encouraged by the state. Indeed, the district court found the clearly articulated and affirmatively expressed state policy and adequate state supervision required by *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in the very fee-setting order being challenged. The statute defining the powers of the racing commission made no mention of jockey fees, and an appeal of the order to the state supreme court, *Gilligan v. Pennsylvania Horse Racing Commission*, 492 Pa. 92, 422 A.2d 487 (1980), was required to establish that the commission had the authority to set fees at all.

Rev.); *Miss. Code* § 77-7-211 *et seq.* (1975), has undertaken to be the final arbiter of the intrastate rates and services of public service companies and is responsible to its citizens for the results of the regulatory process. Given the strong state interests at stake and their authority over price and output, the states should be free to structure with flexibility the means by which carrier and utility proposals are formulated and state policies are implemented, as suggested by the dissent below. The dissent's position would only require an affirmative state policy to displace competition, coupled with active state supervision of its implementation. *See* 702 F.2d at 542-49 (citing *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)). The requirement of an affirmative expression of state policy and genuine state supervision would avoid sham approvals of private action while preserving the states' ability to implement intrastate price and service regulation in accordance with state policies and local conditions.

> A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed.

Cantor v. Detroit Edison Company, 428 U.S. 579, 611 (1976) (Blackmun, J., concurring in judgment).

In concluding that formal state compulsion is a necessary prerequisite to state action immunity, the Fifth Circuit purported to establish a "bright line" distinction between immunized and unlawful activity under the state action doctrine. Undoubtedly, "[b]right lines are important and necessary in many areas of the law," *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 51

U.S.L.W. 4539, 4544 (U.S. May 16, 1983). Yet in the area of federal-state relations, this Court's recent jurisprudence eschews the use of formalistic bright line tests in favor of an analysis of "the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." *Id.* at 4543 (quoting from *Illinois Gas Co. v. Public Service Co.*, 314 U.S. 498, 505 (1942)). "This modern jurisprudence . . . recognizes . . . that there is 'an infinite variety of cases, . . . in which reconciliation of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.' *Southern Pacific Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 768-769 (1945)." *Id.*

As *Arkansas Electric Cooperative Corp. v. Arkansas Public Service* illustrates, state interests in public service company regulation are great. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S.Ct. 1713 (1983), in which the Court found it "almost inconceivable" that Congress should have intended that the states lacked the power to prohibit construction of nuclear power plants on economic grounds, demonstrates the need to give those interests paramount authority, even where Congress has enacted a comprehensive regulatory scheme. "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the states." *Id.* at 1723-24.

Moreover, the bright line test imposed by the Fifth Circuit does not even serve the critical function of a bright line, that of establishing certainty, as it is far from clear what the Fifth Circuit would require for satisfaction of the formal compulsion requirement. *See* 702 F.2d at 536 n.6 and 540 n.15. As Justice Blackmun recognized in *Cantor*:

> To be sure, there is a certain rough justice, as well as an appearance of simplicity, in a rule based upon who actually is responsible for the scheme in question, but I fear that both the justice and the simplicity would prove illusory in the rule's actual application. Every state enactment is initiated, in its way, by its beneficiaries. It would scarcely make sense to immunize only those powerful enough to speak entirely through their governmental representatives, or, for that matter, to stifle such speech with the threat that it will destroy antitrust immunity. Moreover, the process of enactment is likely to involve such a complex interplay between those regulating and those regulated that it will be impossible to identify the true "initiator."

428 U.S. at 610-11.

Given the importance of the state interests involved and the unworkable nature of the "bright line" adopted by the Fifth Circuit, the writ should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 82-1922

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IN THE

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OCTOBER TERM, 1982

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Unit "B"

BRIEF AMICUS CURIAE OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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A petition for writ of certiorari was filed on May 27, 1983, by the Southern Motor Carriers Rate Conference, Inc. (SMCRC), the North Carolina Motor Carriers Association, Inc. (NCMCA) and the National Association of Regulatory Utility Commissioners (NARUC). The brief in opposition of respondent United States is due to be filed on or before July 31, 1983.

American Trucking Associations, Inc. (ATA) files this brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, Unit "B."

INTEREST OF THE *AMICUS CURIAE*

ATA is the national trade association of the trucking industry representing all types of motor carriers of property. It is a federation of individual motor carrier associations organized in each of the fifty States and the District of Columbia. In each case, the member motor carriers of these state associations are engaged in the transportation of property in intrastate as well as interstate commerce.

This brief is filed by ATA on behalf of itself, its affiliated State associations and their member motor common carriers, all of whom share a vital interest in the issues involved in this proceeding.

ARGUMENT

This Case is of Crucial Importance to the Continued Viability of Intrastate Motor Carrier Transportation Systems in Forty States

The essential issue here is whether the collective formulation of intrastate rate proposals by motor carriers in States where such activity is authorized but not compelled violates the federal antitrust laws. The Court of Appeals for the Fifth Circuit, Unit "B," has held that state compulsion for motor carrier collective ratemaking is an absolute prerequisite to application of the "state action" doctrine and therefore SMCRC and NCMCA, defendants below, violated the federal antitrust laws, whether or not the policies in the involved States are "sufficiently clearly articulated and affirmatively expressed for the state action exception to apply." [1]

[1] 702 F.2d 532 at 534, which petitioners have inserted into their petition for writ as Appendix D at 64a.

In presenting the reasons why the writ should be granted, petitioners have stressed the crucial importance of this case to effective state regulation of the intrastate rates of motor common carriers of property. Petitioners have explained how the regulatory schemes of Alabama, Georgia, Mississippi, North Carolina and Tennessee will be affected adversely by enforcement of the Fifth Circuit's holding, and why there will be an immediate and devastating impact on the similar regulatory schemes of the other thirty-five States as represented by petitioner NARUC if the lower court's decision is not overturned.

There is a corollary to petitioners' argument which ATA as *amicus* desires to point out. This case is crucially important to the continued viability of the intrastate motor carrier transportation systems themselves which have developed within the forty States involved.[2]

Intrastate motor carrier transportation in this country, like interstate transportation, is a coordinated system, comprising thousands of carriers joining together to assure service to all points in every State, large and small. Extensive operating relationships have been established which have proven to be advantageous to the provision of adequate, economical and efficient service to shippers.

The drafters of the federal antitrust exemption adopted in 1948 for rail and motor carrier collective ratemaking recognized the importance of this interdependence and interrelationship, as follows:

> The business of common carriers is distinguished from business generally in important and controlling respects. In the first place, it is subject to special and comprehensive regulatory laws; State and National, and to a continuing supervision by administrative agencies of the Government. In the second place, the nature of common carriers is such that there is an inevitable interdependence and interrelationship between the activities of individual carriers.

S. Rep. No. 44, 80th Cong., 1st Sess. 2 (1947).

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[2] Petitioners list the forty States in their brief at 8, n.18.

The development of the various intrastate systems has paralleled that of the federal interstate system. The former exist today as microcosms of the latter. As with the Federal system, the growth of these State systems has been nurtured by the ability of motor carriers to participate in the collective ratemaking process.

Primarily, the motor carriers particiating in the collective ratemaking process are "full service" common carriers of general freight, providing service on both truckload and less-than-truckload shipments. The operations of these carriers involve a pattern of service interconnections among all such carriers in a State, even those in direct competition with each other. The establishment of joint routings between competing carriers allows substantial economies, conserves fuel and achieves desirable load factors. If carriers are estopped from "interlining" freight,[3] service to outlying and smaller communities, in particular, would be either more expensive, less frequent, or both.

The Fifth Circuit's decision impacts adversely on the intrastate motor carrier transportation systems in other ways. The immunized collective process provides a basis for fairly apportioning transportation rates among commodities on the basis of the cost of transportation. The vast majority of carriers do not have the capability of or capacity for doing individually what is done collectively, namely, allocating their costs, e.g., fuel or labor cost, among various segments of their traffic. A typical intrastate motor common carrier deals annually with

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[3] "Interlining" is the transportation term for exchanging freight between motor common carriers at common points of service for delivery to destination. Carriers which are both interline partners and competitors on a particular route would be placed in jeopardy if the antitrust laws were applicable to their discussions of the joint rates. Interlining between such carriers would be unlikely to occur in the absence of antitrust immunization.

thousands of shipments of varying weights consisting of thousands of different commodities moving between hundreds of origins and destinations.[4] For most such carriers, the expense of individually meeting the burden of formulating and justifying cost-oriented rates would exceed their revenues from interstate traffic.[5]

Additionally, the imunized collective process has fostered the development of a common language, which has been essential to carriers and shippers alike. Carriers have been able to construct a simplified system of class rates, which enables shippers to discern whether or not they are being discriminated against.

Because the collective process provides a means of avoiding rate and service discrimination, it has also promoted uniform and stable structures of rates and thereby prevented unfair and destructive competitive practices. Rate stability has meant that rate levels do not fluctuate violently, which would be unhealthy for both shippers and carriers.

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[4] According to the latest statistics on intrastate motor carriers, there were 58,335 such establishments in 1977, generating $12.62 billion in revenues and employing 333,612 persons. U.S. Department of Commerce, Bureau of the Census, 1977 Census of Transportation, Nonregulated Motor Carriers and Public Warehousing 2 (1981). Based upon this information, the average intrastate motor carrier generated $216,000 in revenues and operated with less than 6 employees.

[5] Smaller carriers, in particular, would be confronted with a tremendous financial burden if they had individually to hire and maintain a staff of sufficient size and technical and professional expertise to perform the essential cost analysis and studies currently provided by the various rate bureaus through which collective intrastate rates are currently formulated.

CONCLUSION

For more than three decades now, virtually all of the States have had in effect a regulatory scheme which was patterned upon the federal one. Almost all of these State schemes remain in effect today.[6] The foundation of each has been a transportation policy whose stated goals have paralleled our national transportation policy: safe, adequate, economical, and efficient service, with reasonable rates and without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.[7] Thus, the fears expressed by the drafters of the federal antitrust immunity, concerning the adverse consequences to an interstate system operating in the absence of antitrust immunity, are also applicable to the Fifth Circuit's decision, as it adversely affects the continued viability of the various systems of intrastate motor common carriage:

> There can be no doubt that the public interest would be adversely affected if the antitrust laws were so applied to common carriers as to prevent or discourage such collaboration between such carriers as is essential to or in furtherance of the requirements of the Interstate Commerce Act and the purposes of the national transportation policy which is designed to promote sound economical conditions in transportation, and safe, adequate, and efficient service to the public under reasonable rates and without discrimination or unfair or destructive competitive practices.

S. Rep. No. 44, 80th Cong., 1st Ses. 4 (1947).

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily

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[6] *See* n.2, *supra*.

[7] Interstate Commerce Act, preceding §§ 1, 301, 901, and 1001, 54 Stat. 899 (1940) (current version at 49 U.S.C. § 10101 (1980)).

> meet their duties and responsibilities thereunder and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent. . .

H.R. Rep. No. 1100, 80th Cong., 1st Sess. 4 (1947).

The decision of the Fifth Circuit, Unit "B," will affect adversely the continued viability of intrastate systems of motor common carriage that have developed in the vast majority of the States. This Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, Unit "B."

Respectfully submited,

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v.

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Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA UTILITIES COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA UTILITIES COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of North Carolina and the North Carolina Utilities Commission submit herewith this brief as *amici curiae* in support of the petition for certiorari filed jointly by Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., and the National Association of Regulatory Utility Commissioners ("Petitioners") seeking review of the decisions of the United States Court of Appeals for the Fifth Circuit in

United States v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (Unit B *en banc*), and *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982) (Unit B).

INTEREST OF AMICI CURIAE

The State of North Carolina has enacted a comprehensive statutory scheme for the regulation of all public utilities in North Carolina, including motor common carriers of property. North Carolina General Statutes (NCGS) § 62-3(23)a.4 *et seq.* (1982) (the North Carolina Public Utilities Act). Pursuant to this legislation, it is the exclusive responsibility of the North Carolina Utilities Commission to fix and establish rates for all motor common carriers of property subject to its jurisdiction.

As the agency of the State charged with the duty of administering the Public Utilities Act, the North Carolina Utilities Commission has been accepting and acting upon collective motor carrier rate proposals since 1943 from three motor carrier rate bureaus—the North Carolina Motor Carriers Association ("NCMCA"), the Southern Motor Carriers Rate Conference ("SMCRC"), and Motor Carriers Traffic Association ("MCTA"). These carrier rate bureaus were defendants in this case in the District Court, and two rate bureaus—SMCRC and NCMCA—appealed to the Court of Appeals and have petitioned this Court.

In 1977 the legislature of North Carolina enacted NCGS § 62-152.1 establishing a procedure for the approval of collective rate agreements among the carriers. This legislation expressly authorizes collective rate-proposing by the rate bureaus in North Carolina.

The issue in this case is whether the collective rate-proposing activities of the petitioner rate bureaus in North Carolina are immune from the federal antitrust laws. Since the State of North Carolina has affirmed the importance of collective ratemaking as a means of furthering its overall motor carrier transportation policy, the outcome of this case will determine whether the State of North Carolina will retain the freedom to pursue its long-established regulatory policies with respect to motor carrier ratemaking. Thus, the State of North Carolina and the North Carolina Utilities Commission have a direct interest in the outcome of this litigation. Consequently, the State of North Carolina and the North Carolina Utilities Commission believe that certiorari should be granted in this case.

SUMMARY OF ARGUMENT

The State of North Carolina and the North Carolina Utilities Commission support the reasons for granting the writ set forth by the Petitioners in their Petition. In this brief the *amici curiae* wish to emphasize that the State of North Carolina has a critical and long-standing interest in regulating the intrastate rates of motor carriers subject to its jurisdiction and that the collective rate-proposing activities of the motor carrier rate bureaus are essential in furthering the policy of the State that motor carrier rates be just and reasonable and nondiscriminatory. The regulatory procedure for establishing motor carrier rates in North Carolina allows the North Carolina Utilities Commission to subject the rate proposals of the rate bureaus to rigorous analysis and investigation. This procedure includes the active participation of the Public Staff of the North Carolina Utilities Commission and the Attorney General of North Carolina, both of which represent the using and consuming public.

If the decision of the District Court is left undisturbed, the State of North Carolina will be required to abandon its regulatory scheme of determining motor carrier rates by collective rate-proposing. The ability of the State of North Carolina to ensure that carrier rates are just, reasonable, and nondiscriminatory will consequently be impaired.

ARGUMENT

The Application Of The State Action Doctrine By The Court Of Appeals Fails To Recognize (1) The Critical And Long-Standing Interest Of The State Of North Carolina In Regulating The Rates Of Intrastate Motor Carriers And (2) The Adverse Impact On The State Of North Carolina And Its Utilities Commission If The Decision Of The District Court Is Allowed To Stand

The State of North Carolina has enacted a comprehensive statutory scheme for the regulation of all public utilities in North Carolina, including motor common carriers of property. See North Carolina General Statutes (NCGS) Chapter 62 (the North Carolina Public Utilities Act). Pursuant to this legislation, it is the responsibility of the North Carolina Utilities Commission (hereinafter "NCUC") to administer and enforce the Public Utilities Act and to require that all public utilities in North Carolina, including motor carriers, provide adequate and efficient service at rates that are just and reasonable and nondiscriminatory. NCGS § 62-2.

With respect to the regulation of motor carriers, NCGS § 62-259 provides:

> "*Additional declaration of policy for motor carriers.* In addition to the declaration of policy set forth in G.S. 62-2 of Article 1 of Chapter 62, it is declared the policy of the State of North Carolina to preserve and continue all motor carrier transportation services

> now afforded this State; and to provide fair and impartial regulations of motor carriers in the use of public highways in such a manner as to promote, in the interest of the public, the inherent advantages of highway transportaion; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster a coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce."

Since the early 1940's, the NCUC has been charged with the exclusive responsibility to fix and establish rates for all motor common carriers of property subject to its jurisdiction. The statutes require the NCUC to "make, fix, establish, or allow just and reasonable rates." NCGS § 62-130. The policy expressed in the North Carolina statutes is that the NCUC establish motor carrier rates for the shipping public that are just and reasonable and nonpreferential and nondiscriminatory. NCGS § 62-140. It cannot be emphasized strongly enough that motor carrier rates in North Carolina are fixed and established by the NCUC and not by the motor carrier rate bureaus.

As the record in this case discloses, there are approximately 600 motor common carriers in North Carolina that are subject to the jurisdiction of the NCUC with respect to rates and service. Although the procedure of the NCUC contemplates applications for rate increases by an individual motor carrier or by one or more carriers filing applications through rate bureaus, the overwhelming majority of motor carrier rates are filed collectively through the carrier rate bureaus. The NCUC has been

accepting and acting upon collective rate proposals since 1943 from three rate bureaus—the North Carolina Motor Carriers Association, the Southern Motor Carriers Rate Conference, and Motor Carriers Traffic Association, Inc. These three rate bureaus were defendants in the District Court, and two of the rate bureaus—the SMCRC and the NCMCA—appealed to the Court of Appeals and have petitioned this Court for certiorari.

The practice and procedure of the NCUC require that the three rate bureaus play an important role in proposing intrastate motor carrier rates in North Carolina. In 1949 the NCUC requested that the three rate bureaus file their collective rate proposals with the same effective date. Rule 4-4(b) of the NCUC, which has been in effect since 1945, provides that applications for permission to change or establish motor carriers' rates on less than statutory notice must be made "by the carrier *or the agent holding authority to file the proposed publication.*" Since 1947, legislation in North Carolina has provided that service of NCUC orders and notices may be made upon the carrier involved or the "agent who has filed a tariff or schedule in behalf of such carrier." NCGS § 62-270. Pursuant to this legislation, the NCUC since 1947 has been routinely sending orders and notices to the three carrier rate bureaus on behalf of their member carriers. From 1947 until the present time, approximately ninety percent of the general commodity motor carrier rate proposals to the NCUC have been made by the three rate bureaus on behalf of their member carriers. (R 1323).

Consequently, the collective rate proposals of the three rate bureaus have played an important role since the early 1940's. In fact, the Commission regards the collective activity of the rate bureaus as essential to the efficient regulation of intrastate rates. The NCUC's Director

of Transportation stated in his affidavit in the District Court: "If collective rate proposals by the three rate bureaus in North Carolina are enjoined by this Court, in my opinion, it would have severe consequences on the regulation of the motor carrier industry in North Carolina."

The legislature of North Carolina affirmed the importance of the collective rate proposing activity in 1977 when it enacted NCGS § 62-152.1, establishing a procedure for the approval of joint rate agreements among carriers. This legislation expressly authorized collective rate proposing in North Carolina. Subsection (b) of the statute declares:

> "For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class."

The statute contemplates that carriers will apply to the NCUC for approval of agreements respecting collective rate action. The NCUC must approve these agreements if it finds that such approval will further the overall goals of regulation expressed in NCGS § 62-2 and the transportation policy expressed in NCGS § 62-259. Subsection (h) of the statute provides that, upon approval of the agreement, the parties thereto are "relieved from the operation of the antitrust laws with respect to the making of such agreement."

The NCUC in 1977 established Rule R4-12 which sets out a procedure to implement NCGS § 62-152.1. An application for the approval of a joint rate agreement among carriers must contain, among other information, a copy of the rate agreement, the constitution and by-laws of the rate bureau, and a statement showing that the goals of

the rate agreement will further the transportation policy of the State of North Carolina.

The affidavits filed by the Staff of the NCUC in this case set out in comprehensive detail the procedures followed by the NCUC, the Public Staff of the NCUC, and the Attorney General of North Carolina when proposals for motor common carrier rates are filed with the NCUC. (R 1318 and R 1322). In summary, these affidavits show:

1. Carriers and rate bureaus proposing a rate change must file the proposed tariff with the NCUC thirty (30) days prior to its effective date. NCGS § 62-134 and NCUC Rules R1-15 and R1-17. Any such filing must be accompanied by justification and data; the data is extensive if a general rate increase is being proposed. NCUC Rule R1-17. The Chief Clerk of the NCUC distributes the rate proposals to the NCUC Staff, the Public Staff, and the Attorney General. Either the NCUC Staff, the Public Staff, or the Attorney General may, within the 30-day period prior to the rate's effective date, request the NCUC to exercise its power to suspend a rate proposal pending further investigation and hearing. (R 1319-1321). The NCUC convenes on a weekly basis to hear these recommendations from the Public Staff, the NCUC Staff, or other interested parties; the NCUC then determines whether further investigation and hearings are needed. The NCUC, of course, on its own motion may suspend a filing and set it for hearing and investigation. NCGS § 62-134(b).

2. In cases involving general commodity general rate increases, the NCUC always suspends the tariff filing for further investigation and almost always conducts a hearing to determine the reasonableness of a rate proposal. (R 1325). Investigations and hearings are usually ordered even for filings involving less than general rate increases.

3. Once a hearing is set, the Public Staff, on behalf of the using and consuming public, performs a more intensive analysis and investigation of the rate proposals. (R 1320).

4. The hearings of the NCUC are subject to public notice and are open to the public. (R 1325). At the hearings the Public Staff appears through its counsel and presents testimony and cross-examination. The Public Staff's testimony embodies a rate recommendation which is based on its independent investigation and analysis. This recommendation is almost always different from and lower than the proposals of the rate bureaus. The Public Staff has been very successful in having the NCUC adopt its recommendations and reject those proposed by the carriers. There are numerous instances where the NCUC has rejected or substantially modified rate proposals filed by the carrier bureaus. (R 1325).

The Public Staff was created by the North Carolina legislature in 1977 as a new—and independent—agency in the NCUC. The Public Staff, which is headed by an Executive Director appointed by the Governor, represents the using and consuming public in all proceedings before the NCUC, including motor common carrier rate cases. NCGS § 62-15. The Public Staff consists of attorneys, accountants, engineers, economists, and rate specialists. There are eighteen Public Staff employees directly involved with motor common carrier rates on a daily basis, including the Executive Director, eight rate specialists, three accountants, and six attorneys. When motor carrier rate proposals are filed by the three rate bureaus, they are reviewed and thoroughly analyzed by the Public Staff.

The Attorney General of North Carolina is also authorized to represent the using and consuming public in all

matters before the NCUC. NCGS § 62-20. The Attorney General maintains a separate utility division headed by a Special Deputy Attorney General to carry out this duty. Both the Attorney General and the Public Staff have the power to appeal NCUC orders to the appellate Courts of the State. NCGS § 62-15 and § 62-20.

The North Carolina Utilities Commission establishes and determines intrastate motor carrier rates pursuant to and in furtherance of the comprehensive scheme enacted by the North Carolina Legislature in the Public Utilities Act. The Commission does not "rubber stamp" the collective rate proposals filed by the rate bureaus. Nor is it accurate to say, as was stated in the Order of the District Court, that the relationship between the rate bureaus and the regulatory process "ranges from friendly to intimate." The Commission's procedure for the setting of motor carrier rates subjects the carriers' rate proposals to rigorous analysis and investigation. As pointed out by the Commission's Director of Transportation in his affidavit:

> "To my knowledge, there has never been a general rate increase proposal on general commodities by motor carriers in North Carolina that has not been suspended by the Commission and thoroughly investigated by the Commission (now Public Staff); and, with the exception of the emergency fuel surcharge allowed on an interim basis to the motor carriers during the 1974 Arab Oil Embargo, to my knowledge, there has never been a motor carrier general commodity general rate increase granted by the Commission without a hearing before the Commission."

The Commission's active role in fixing carrier rates has worked well to protect the shipping public in the State. According to the NCUC's Director of Transportation,

North Carolina intrastate motor carrier rates were approximately 25 percent below interstate motor carrier rates.

The record in this case demonstrates that motor carrier rates in North Carolina have been determined largely through collective ratemaking since the 1940's. From 1947 to 1978, approximately ninety percent of the motor carrier rate proposals to the NCUC have been made by the three rate bureaus on behalf of their member carriers. In view of the hundreds of motor carriers franchised to do business in North Carolina intrastate commerce, the NCUC regards the collective activity of the rate bureaus as necessary to the efficient regulation of intrastate carrier rates. The NCUC's Director of Transportation stated in his affidavit: "If collective rate proposals by the three rate bureaus in North Carolina are enjoined by this Court, in my opinion, it would have severe consequences on the regulation of the motor carrier industry in North Carolina." The Director elaborated further on the "severe consequences" on motor carrier rate regulation in North Carolina if collective ratemaking were abolished:

> "All carriers would be put to the added expense of preparing and filing individual rate proposals and maintaining individual tariffs, which added expense would be reflected in higher rates to the shippers. While large carriers might be able to absorb these increased administrative expenses, they would have a severe adverse effect on small carriers. Furthermore, small carriers would run the risk of domination by larger carriers who could transport products on a volume basis. Shippers would also be put to the increased administrative expense of maintaining additional personnel to analyze the numerous rate proposals brought about by individual tariff filings and to contest proposals before the Commission. Finally, the staff and budget of both the Public Staff

> and the Commission would have to be greatly increased in order to properly handle the greatly increased individual rate proposals and tariff filings." (R. 1318).

An examination of the North Carolina Public Utilities Act discloses that the State of North Carolina has chosen, in furtherance of its overall motor carrier transportation policy, to substitute the regulation of motor carrier rates for competition. The economic regulation of motor carrier rates by the State is in furtherance of the expressly announced goals to provide just and reasonable rates for motor carrier transportation without unjust discrimination or undue preferences; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; and to foster a coordinated statewide motor carrier service. NCGS § 62-2; § 62-130; § 62-140; § 62-259. The State should retain the freedom to pursue its regulatory policies with such flexibility as will meet the needs of its citizens. If the decision of the District Court is left undisturbed, the State of North Carolina will be required to abandon its regulatory scheme of determining carrier rates by collective rate proposing and to determine carrier rates based upon the separate rate applications of more than 600 individual motor carriers. The result will be the inability of the State of North Carolina to discharge its duty to ensure that motor carrier rates are just, reasonable, and nondiscriminatory.

CONCLUSION

For the foregoing reasons the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

35pp

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QUESTIONS PRESENTED

1. Whether private collective intrastate rate agreements among motor carriers, which are not compelled by state law, are "state action" and therefore not subject to the Sherman Act.

2. Whether the *Noerr-Pennington* doctrine immunizes such private agreements from the Sherman Act because the rates agreed upon are subsequently submitted to state regulatory authorities.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 63a-93a) is reported at 702 F.2d 532. The panel opinion of the court of appeals (Pet. App. 31a-60a) is reported at 672 F.2d 469. The opinion of the district court (Pet. App. 1a-30a) is reported at 467 F. Supp. 471. The judgment entered by the district court (App., *infra*, 1a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. The petition for a writ of certiorari was filed on May 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Southern Motor Carriers Rate Conference, Inc. (SMCRC) and North Carolina Motor Carriers Association, Inc. (NCMCA), and respondent Motor Carriers Traffic Association (MCTA), all of which were defendants in the district court, are motor carrier rate bureaus. Their members are motor carriers, many of which compete with each other. The bureaus provide a forum for competing member carriers to discuss and agree on intrastate motor carrier rates, which are then submitted to state public service commissions for approval. The bureaus also perform several other functions that are not involved in this case: they publish tariffs and supplements containing the rates agreed upon, and they provide counsel, staff experts, and facilities for the preparation of cost studies and other types of exhibits and testimony for use in support of proposed rates at state regulatory commission hearings. Pet. App. 63a-64a.[1]

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[1] SMCRC performs rate bureau functions with respect to intrastate motor common carrier rates for the transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee (R. 81, 129). ("R." refers to the record in the district court. Where the reference is to the entire docket item, the page number given refers to the first page of the item.) There is a separate rate committee for each state (R. 1279). MCTA performs the same functions with respect to North Carolina intrastate rates (R. 39, 131-132), as does NCMCA (R. 68, 130). There is cooperation and coordination among these rate bureaus in North Carolina, where all three operate. Pet. App. 8a.

SMCRC and MCTA also act as rate bureaus for interstate rates under agreements approved by the Interstate Commerce Commission (see 49 U.S.C. (Supp. V) 10706(b)). R. 40, 82-83. The ICC's jurisdiction over motor common carrier transportation services and rates is limited to interstate transportation, that is, movement across state lines (49 U.S.C. (Supp. V) 10521), and interstate rate practices are not at issue in this case.

Motor carriers operating within any one of the five states in which these rate bureaus have established agreed-upon rates—Alabama, Georgia, Mississippi, North Carolina and Tennessee—are subject to regulation by state commissions. Motor common carriers engaging in intrastate transportation of general commodities within any of these states are required by law to obtain certificates of public convenience and necessity from the regulatory commission of that state. Motor carrier rate regulation in the five states follows the same basic pattern: carriers must file their intrastate rates and proposed rate changes with the appropriate state commission; proposed rates take effect unless the commission sets them for hearing; if a hearing is ordered, the rates take effect only after they are approved or modified by the commission. See Pet. App. 3a-9a.

None of the five states imposes any statutory requirement that carriers propose rates in a concerted manner through rate bureaus. Pet. App. 10a-11a. At the time this lawsuit was filed, there was no mention in any statute of rate bureaus or rate agreements among intrastate carriers. Subsequently, North Carolina, Tennessee and Georgia adopted statutes dealing in some way with collective ratemaking procedures. None of these statutes, however, requires motor carriers to join rate bureaus or participate in collective rate agreements; they all allow a regulated carrier to file its own individual tariffs or, even if it is a rate bureau member, to refuse to adopt the rate agreed upon by the bureau members and to file an independent rate.[2]

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[2] In 1977, North Carolina enacted a statute that allows any carrier subject to the state commission's jurisdiction to submit "an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or

2. In November 1976, the government filed a complaint under Section 4 of the Sherman Act, 15 U.S.C. 4, to enjoin the continuing violation of Section 1 of the Sherman Act, 15 U.S.C. 1, by SMCRC, NCMCA, and MCTA. Pet. App. 63a-64a. No state agencies or state officials were named as defendants and the government did not seek to enjoin any state regulatory functions.[3] The complaint alleged that the rate bureaus and their co-conspirators were engaged in a

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charges" to the state public utility commission for approval and provides that agreements so approved are exempt from the state's antitrust laws. N.C. Gen. Stat. § 62-152.1(b) (1982). No such agreements are required to be submitted, and no agreement is to be approved unless the commission "finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure." *Id.* § 62.152.1(e). A 1980 amendment to the Tennessee Code authorizes the public service commission to establish "rate-making procedures for all classes of motor common carriers, *including* collective rate-making procedures" and requires that "all carriers party to * * * [a collective ratemaking] agreement shall be required to comply with [the established] rate-making procedures." Tenn. Code Ann. § 65-15-106(d) (1982) (emphasis added). A 1980 amendment to the Georgia Code provides that "the commission shall establish rate-making procedures for all motor common carriers, which procedures shall include, *but not be limited to*, collective ratemaking procedures" and that "[a]ll motor carriers shall be required to comply with [the established] rate-making procedures." Ga. Code Ann. § 46-7-18 (1982) (emphasis added) (formerly Ga. Code § 68-613 (1933)).

Neither Alabama nor Mississippi currently has any statute dealing with rate bureaus.

[3] Nevertheless, the district court allowed the National Association of Regulatory Utility Commissioners to intervene as a defendant to represent the regulatory commissions of the five subject states, and the attorneys general of the five subject states were invited to participate as amici curiae. Pet. App. 32a n.2.

continuing conspiracy to fix rates charged for intrastate for-hire transportation of general commodities within the five states in which the bureaus operate.[4]

The district court granted summary judgment for the government. The court first rejected the defendants' contention that their activities were immune from the antitrust laws under the "state action" doctrine derived from *Parker* v. *Brown*, 317 U.S. 341 (1943). Pet. App. 11a-24a. The court noted that none of the states required rates among competing carriers to be uniform; on the contrary, each state guaranteed to all carriers the right to charge rates lower than or different from their competitors' rates. *Id.* at 9a-10a. Nor did any state require that rates proposed by carriers "be formulated or published by rate conference." *Id.* at 11a. Indeed, the court noted that "it is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states." *Id.* at 21a. Because "the practice [of fixing rates by private agreement] is nowhere compelled" (*ibid.*), the district court concluded that the restraint on competition resulting from the rate bureaus' collusive setting of proposed rates was attributable to private conduct rather than state action and was therefore not immune from the antitrust laws. *Id.* at 11a-24a.

The court also rejected (Pet. App. 24a-26a) the defendants' contention that their conduct was immunized by the so-called *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference* v. *Noerr Mo-*

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[4] The parties stipulated that the movement of general commodities by motor common carriers within these five states and the rates and charges assesssed for such movements "have a 'direct and substantial effect on interstate commerce' within the meaning of the Sherman Act" (R. 1268, ¶ 4).

tor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). See also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). The court then held that the collective intrastate rate agreements among the members of the three rate bureau defendants constituted per se violations of Section 1 of the Sherman Act. Pet. App. 26a-29a. In reaching this conclusion, the court rejected, on the basis of *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), the defendants' argument that they only proposed—and the state commissions actually fixed—intrastate trucking rates. The court ruled that the defendants' conduct "easily fits the classic description of a 'naked price restraint.'" Pet. App. 28a. By displacing competition with concerted pricing decisions within the "zone of reasonableness" allowed by the regulatory agencies, the court concluded, the rate bureaus had violated the Sherman Act "at its most sensitive spot." *Ibid.*

The final judgment (App., *infra*, 4a-5a) enjoined the three rate bureau defendants from entering into or maintaining any conspiracy to fix collective intrastate rates [5] or providing a forum for any discussion of collective rates. The provisions of the final judgment, however, permit the rate bureaus to continue to act as agents for intrastate carriers by publishing, in a single tariff if desired, rates independently arrived at by each competing carrier. In addition, each rate

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[5] The decree does not prohibit carriers who are parties to a joint rate—"a single rate applied jointly by two carriers to cover a shipment in which one carrier operates over only part of the route and the other carrier serves the remaining distance to the destination" (Pet. App. 42a n.11)—from agreeing on that rate. Thus the suggestion of amicus curiae American Trucking Association, Inc., that the court of appeals' decision will interfere with "interlining" (Br. 4) is plainly incorrect.

bureau is permitted to provide statistical data and advice—including justifications for an individual carrier's rates filed with a state agency—to any carrier wishing to avail itself of the rate bureaus' expertise in the compilation and publication of tariffs.

3. A panel of the court of appeals affirmed. Pet. App. 31a-60a. The court of appeals then agreed to rehear the case en banc and again affirmed.[6] *Id.* at 63a-93a. The court reasoned that the "state action" exemption did not apply because where a state has not compelled private parties to engage in anticompetitive conduct, but rather has afforded those parties the option of competing or colluding, their anticompetitive conduct is fairly attributable to private volition and thus not exempt from federal antitrust laws as state action. The court stated that *Parker* v. *Brown*, *supra*, "established the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign." Pet. App. 66a. The court explained that the anticompetitive action of a private party is fairly attributable to the state—rather than to the private party itself—only if the activity is required or compelled by the state acting as sovereign. *Id.* at 66a-69a.

The court noted that compulsion might not be required when public defendants, rather than private parties, seek to invoke the state action exemption, because if a unit of government is carrying out a clearly articulated, actively-supervised state policy, there is a basis for attributing the acts of that governmental unit to the state. Pet. App. 70a-71a. But the court explained that compulsion is necessary when a private party is acting in an anticompetitive fashion (*id.* at 69a-70a; footnote omitted):

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[6] Judge Johnson wrote the majority opinion for both the panel and the en banc court.

> [W]hen a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state * * * .
>
> * * * * *
>
> So long as the state merely allows, but does not compel, anticompetitive conduct, the decision to adopt such conduct remains that of the individual and is within the scope of the Sherman Act. Regardless of how strongly a state may wish to remove private action from the Act's jurisdiction, it will not succeed unless it structures a program so as to make individual actions the actions of the state itself—by means of the mechanism of compulsion.

The court also noted that "if a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time." Pet. App. 70a n.9. Finally, the court of appeals pointed out that this Court has consistently ruled that "state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity" and that there is no significant distinction between such state activity and the situation presented here—where "a state grants private parties the option of participating in a scheme of state supervision." *Id.* at 77a.

The court of appeals also rejected the defendants' *Noerr-Pennington* contention, endorsing the district court's explanation that the " 'coordinating and fixing of rates' " is a prohibited anticompetitive activity quite distinct from " 'presenting the collectively set

rates to the state commissions' "; only the latter activity is arguably protected by the *Noerr-Pennington* doctrine. Pet. App. 43a-44a, quoting *id.* at 25a; see *id.* at 80a. The court of appeals also affirmed the district court's holdings that the defendants had violated the Sherman Act and that the Interstate Commerce Act did not create an implied immunity for the defendants' conduct. See *id.* at 40a, 45a-51a, 80a & n.20.

Four judges dissented. Judge Hill, in the principal dissent,[7] acknowledged that the court's "conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible." Pet. App. 81a. But he urged that language in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), required the court to extend state action immunity to any private party acting consistently with a clearly articulated state policy the implementation of which is actively supervised by the state. Pet. App. 81a, 83a.

ARGUMENT

1. Petitioners do not dispute the conclusion, reached by both courts below, that the challenged collective rate agreements constitute price fixing that would ordinarily be per se unlawful under the Sherman Act. Petitioners contend, however, that the agreements are exempt from the Sherman Act under the "state action" doctrine (Pet. 8-15), even though they do not dispute the conclusion—reached by the district court, the panel, and the en banc court of appeals—that no state law compels carriers to reach such agreements. Petitioners' contention is essentially

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[7] Judge Hill had also dissented from the panel decision. Pet. App. 52a-60a.

that such price fixing, while not compelled by any state, is nevertheless exempt from the antitrust laws because it is generally consonant with state policy. See *id.* at 6, 13-14. As the court of appeals recognized, this contention is foreclosed by the decisions of this Court and by the logic of the "state action" exemption, both of which deny state action immunity to private conduct unless it is compelled by the state.

a. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court unanimously held that when a private party seeks to invoke the state action exemption, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity *is required by the State* acting as sovereign." *Id.* at 790 (emphasis added). Because the State of Virginia did not require a minimum fee schedule for attorneys, the Court held that the promulgation and use of such a fee schedule by associations of private attorneys was not immune from challenge under the antitrust laws. *Id.* at 790-792. The Court explicitly rejected the defendants' argument that they could invoke the state action exemption because their activities "complemented the objective" of the state or were "prompted" by state action. The Court firmly stated that this was "not enough." *Id.* at 791. "[A]nticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity. *Ibid.* (emphasis added).

In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), the Court reiterated this holding. *Id.* at 593 n.28. Each of the opinions in *Cantor* specifically noted, and endorsed, the "carefully drafted language in the *Goldfarb* opinion" (*id.* at 624 (opinion of

Stewart, J.)), holding that a private party's anti-competitive conduct does not fall within the state action exemption unless the state compels it. See *id.* at 600 & n.41 (plurality opinion); *id.* at 604 (Burger, C.J., concurring); *id.* at 609 (Blackmun, J., concurring); *id.* at 623-626 (Stewart, J., dissenting). Anything short of compulsion, the Court explained, is not sufficient to warrant applying the state action exemption to private conduct: "The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.* at 592-593 (footnotes omitted). A private party would not be entitled to state action immunity from the antitrust laws, the Court held, if "notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593. Since the private utility defendant in *Cantor*—and not the state—made the decision to institute the challenged conduct, this Court held that the privately imposed restraint at issue was not shielded by the state action exemption. *Id.* at 592-598.

b. The compulsion requirement of *Goldfarb* and *Cantor* follows directly from the rationale of the state action exemption. In *Parker* v. *Brown*, 317 U.S. 341 (1943), where the Court first articulated the exemption, the Court noted that Congress intended the Sherman Act to be a broad prohibition on restraints imposed on competition by private conduct; but the Court concluded that the Act was not intended to prohibit a state from restraining or eliminating competition. The Court reasoned that in the absence of a clear congressional direction, it should not interpret

the Sherman Act to prohibit "state action or official action directed by a state." *Id.* at 351. At the same time, however, the Court emphasized that the states may not immunize private restraints of trade from the Sherman Act: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351. See also *Northern Securities Co.* v. *United States*, 193 U.S. 197, 346 (1904); *Cantor*, *supra*, 428 U.S. at 592-593.

It follows that a court, in deciding whether certain conduct is immunized by the state action doctrine, must determine "whether the challenged acts could be attributed to the state as sovereign" (Pet. App. 66a) or instead constitute essentially private conduct. Where a private restraint is compelled by the state, the private party's action is fairly viewed as mere obedience to the *state's* decision to displace competition. But if private conduct is not compelled by the state—if it is merely allowed—the state has not made the decision to displace competition; it has left it to private parties to decide whether or not they will conform their conduct to the federal antitrust laws.

In this situation, any restraint resulting from private conduct fairly may be attributed to the private parties themselves. See *Cantor*, *supra*, 428 U.S. at 593-595. Because the state may not frustrate federal antitrust policy by "authorizing" private parties to compete or not as they wish, the private conduct, even if authorized by the state, is subject to the federal antitrust laws. Moreover, as the court of appeals noted, where the decision to compete or not is left to the private party, it can comply with both the federal antitrust laws and state regulatory laws; thus there is no actual conflict between state and federal law,

and applying federal antitrust law cannot frustrate the implementation of the state regulatory scheme. See *Cantor, supra*, 428 U.S. at 595. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 463 (1969).[8]

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[8] As the court of appeals noted, this rationale also explains the standards that apply when alleged anticompetitive conduct by a state governmental entity, rather than private parties, is at issue. In such cases, the threshold state action question still is whether that action is the result of the state's decision to displace competition with an alternative system of regulation that the state implements to protect the public welfare. The Court has recognized, however, that for practical reasons state legislatures often cannot delegate power to subordinate agencies by expressly compelling the agencies to perform specific tasks by precisely described means; instead, the states often must delegate power to subordinate government units by giving them some discretion in implementing state policies that have been expressed in more general terms. See generally *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (plurality opinion); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51 (1982).

Accordingly, the Court has not required that the action of a state agency be compelled by the state legislature in order to be attributable to the state and therefore within the state action exemption. Rather, conduct of a municipality or a state agency which implements a clearly articulated state policy to displace competition with regulation is attributed to the state. *City of Lafayette, supra*, 435 U.S. at 410, 413, 415; *City of Boulder, supra*, 455 U.S. at 55. Even in the case of state instrumentalities, however, mere neutrality on the part of the state is not sufficient to confer state action immunity. *Ibid.* Unless there is a clearly articulated state policy, the action of a subordinate state agency is not "state action," because subordinate state entities are not themselves "the state as sovereign." *City of Lafayette, supra*, 435 U.S. at 414-415; *City of Boulder, supra*, 455 U.S. at 53-54.

In addition to requiring that subordinate state agencies acting to displace competition do so only in furtherance of a clearly articulated state policy, the Court has held that it is not

Here, as we noted, petitioners do not contend that any state compelled the challenged anticompetitive conduct. The states have merely given carriers the option of engaging in such conduct. Thus, the decision in favor of what amounts to private price fixing was not made by the states in the exercise of their sovereign powers; it was made by the carriers, and the fact that a state authorized that choice is, as the Court has repeatedly emphasized, not sufficient to confer state action immunity. Within the state regulatory regime, motor carriers can engage in either collusive conduct—rate agreements like those challenged here—or competitive conduct—the submission of individual tariffs. In this area, state law has given carriers the option to choose between competition and collusion. This is the same thing state law does in areas it leaves unregulated. And when the state gives regulated private parties the choice between competition and collusion, just as when it leaves them unregulated, the Sherman Act requires the choice of competition.[9]

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enough for the state merely to displace competition. It must replace it with some form of governmental regulation rather than leaving implementation of its policy solely to the discretionary acts of private parties. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

[9] Petitioners are incorrect in insisting (see Pet. 11, 13) that the relationship between the private parties and the state in this case resembles that in *Parker*. In *Parker*, the state decided to impose an anticompetitive regime; that it made this decision at the behest of private parties was not considered material. Here, the state regulatory regimes permit carriers to propose rates in either a competitive or a collusive fashion, and the carriers chose to collude. Collusion was not imposed on them by the states. See Pet. App. 67a-68a n.6.

Petitioners do not discuss *Goldfarb*, *Cantor*, or the logical basis of the state action exemption. Instead, they rely on language in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In that case, the Court said that a restraint on competition falls within the state action exemption only if it is " 'clearly articulated and affirmatively expressed as state policy' [and] * * * the policy [is] * * * 'actively supervised' by the state itself." *Id.* at 105, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.). Petitioners appear to contend that the rate agreements satisfy this test and therefore are entitled to immunity under the state action doctrine.

Midcal, however, was a suit seeking to enjoin the operation of a state statute; as we have explained (pages 13-14 note 8, *supra*), state compulsion (although it was in fact clearly present in *Midcal*) is not always necessary to permit a unit of government to invoke the state action exemption.[10] Contrary to petitioners, *Midcal* did not alter the requirement that a private party's action must be compelled by the state if that party is to take advantage of the state action exemption. Indeed, the Court in *Midcal* specifically quoted from *Goldfarb*: " 'It is not enough that * * * anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign.' " 445 U.S. at 104, quoting *Goldfarb*, *supra*, 421 U.S. at

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[10] In *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51 n.14 (1982), the Court specifically noted that the *Midcal* description of the state action exemption dealt with "anticompetitive restraints engaged in by state municipalities or subdivisions."

791. The Court in *Midcal* also expressly relied on *Goldfarb* and *Cantor*, among other decisions, as "establish[ing]" the standard respondents invoke (445 U.S. at 105); thus the *Goldfarb* and *Cantor* compulsion requirement cannot be inconsistent with *Midcal*. And nothing in the *Midcal* opinion suggests that the Court was reconsidering the requirements it had previously established for private parties seeking to invoke the state action exemption. As the court of appeals noted, and as we have explained, while a clearly articulated and enforced state policy of regulation is sufficient to permit a unit of government to invoke the state action exemption, the *Parker* v. *Brown* policy of federalism on which the state action exemption is based requires that a private party show that the state compelled its anticompetitive act.[11]

c. Petitioners also suggest that, as a matter of public policy, the state action exemption should be extended to cover their rate agreements. If, as petitioners contend (Pet. 7-8), rate agreements are essential to permit the states effectively to regulate motor carrier rates, the states are free to require such agreements; but it is undisputed that none of the subject states has done so. Petitioners are correct in pointing out that there would presumably be less competition if the states did so, since some carriers now file individual rates. But as the court of appeals explained, "it is the source of the decision to compete—not the extent of competition—which determines whether state action exists." Pet. App. 79a. That is because, as we have explained, the state action exemption is based on principles of federalism:

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[11] See Pet. App. 76a: "[R]eading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*."

Congress did not intend to prohibit states' decisions to displace competition, but it did intend to prohibit such decisions when made by private persons.

d. Petitioners' contention that there is a conflict among the circuits (Pet. 15-17) is incorrect. Petitioners acknowledge (*id.* at 17) that *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), involved only a municipal defendant and therefore did not address the question whether state compulsion is required to establish a private party's state action immunity. In *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, 456 U.S. 1011 (1982), the state action holding was an alternative basis for the decision (see 670 F.2d at 822), and the language quoted by petitioners (Pet. 16) is from a footnote discussion not essential to the state action holding. Moreover, the decision in *Turf Paradise* is not inconsistent with the court of appeals' holding here. In that case, the challenged agreement allocated racing dates for the one race track in Phoenix. State law prohibited two race tracks from operating simultaneously in the same county, and where two or more applicants sought the required permits for the same date, they were directed by statute to resolve the conflict by private agreement. If no agreement was reached, the state racing agency would allocate days, with current permit holders given preference for days in which they had permits in previous years. 670 F.2d at 816-817. As the court of appeals analyzed the case, the state had left no room for competition: either the competitors were to settle the matter by agreement, or the state would settle it by fiat. That situation contrasts sharply with the present case, where the states have not precluded motor carriers from competing. Notably, in *United States*

v. *Title Insurance Rating Bureau, Inc.*, 700 F.2d 1247 (9th Cir. 1983), petition for cert. pending, No. 83-154, the Ninth Circuit considered it dispositive of a state action claim that the state law—like the state laws here—did "not require uniform rates: it allows a title insurer to file independent rates," (700 F.2d at 1253). *Title Insurance Rating Bureau* did not cite *Turf Paradise.*

In *Caribe Trailer Systems, Inc.* v. *Puerto Rico Maritime Shipping Authority*, 475 F. Supp. 711 (D.D.C. 1979), aff'd per curiam, No. 79-1658 (D.C. Cir. July 3, 1980), cert. denied, 450 U.S. 914 (1981), the principal issue was the state action immunity to be accorded to certain actions by government agencies; the district court conferred immunity on the challenged actions of private parties because it viewed them as ancillary to the state agencies' lawful monopoly. See 475 F. Supp. at 724. The remark quoted by petitioners (Pet. 16) was made in a casual introduction to the district court's discussion of state action and was not integral to its analysis; in any event, the District of Columbia Circuit's summary affirmance cannot be interpreted as reflecting a considered view at odds with that of the court of appeals in this case.

2. Petitioners also contend (Pet. 9-11) that the Sherman Act should not be applied to state-regulated intrastate carriers' collective ratemaking because the Interstate Commerce Act provides an express and limited exemption for collective *interstate* ratemaking. But as the courts below concluded (Pet. App. 40a n.9, 80a n.20), the Interstate Commerce Act creates no exemption, express or implied, for collective intrastate ratemaking, and it does not authorize

the states to confer such immunity.[12] Petitioners point to nothing in the Interstate Commerce Act suggesting that such an immunity exists. Any differences in the regulatory regimes proposed for interstate and intrastate rates are simply the result of choices made by Congress.[13]

3. Finally, petitioners contend (Pet. 19-20) that under the *Noerr-Pennington* doctrine, the Sherman Act does not apply to their price fixing. In order to accept this contention, the Court would have to overrule *Georgia* v. *Pennsylvania R.R.*, *supra*, which held that submission to a regulatory agency of collectively established rates does violate the Sherman Act; while *Georgia* v. *Pennsylvania R.R.* was decided before *Noerr*, nothing in *Noerr* suggests that the Court intended to overrule the earlier decision.

Moreover, in *Noerr* itself the Court distinguished between combinations of private parties for the purpose of "persuad[ing] the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," which are not prohibited by the Sherman Act, and "combina-

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[12] By contrast, the McCarran-Ferguson Act, for example, provides express antitrust immunity for "the business of insurance" to the extent regulated by state law. 15 U.S.C. 1012.

[13] In any event, these differences are likely to be sharply reduced in the future. While the Interstate Commerce Act currently permits agreements among carriers on rates for shipments in interstate commerce, 49 U.S.C. (Supp. V) 10706(b)(3)(D) provides that the ICC will not be allowed to approve any agreements among motor carriers that "provide for discussion of or voting upon single-line rates on or after January 1, 1984." In explaining this amendment, the House Report stated that such rate agreements are harmful to consumers because they tend to protect inefficient carriers. H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 27 (1980).

tions ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom * * * through the use of such devices as price-fixing agreements," which do violate the Sherman Act. 365 U.S. at 136. This case involves the latter kind of combinations. The motor carriers whose agreements are at issue here are not engaging in "mere attempts to influence the passage or enforcement of laws" (*id.* at 135); they are operating within a state regulatory scheme in a way designed to reduce competition by fixing prices among themselves. The mere fact that their anticompetitive behavior also brings them into contact with state regulators at some point does not entitle them to antitrust immunity. See *Cantor*, *supra*, 428 U.S. at 601-602 (opinion of Stevens, J.); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 807 (2d Cir. 1983), petition for cert. pending, No. 82-2128 ("a mere *incident* of regulation—the tariff filing requirement—is [not] tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*").[14]

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[14] Moreover, immunizing the rate agreements would thwart the principal objective of the *Noerr-Pennington* exemption—to protect the flow of information to public officials. See *Noerr*, *supra*, 365 U.S. at 137. The collusive activities at issue here limit the flow of information by substituting a single proposal for the diversity of views that regulators would otherwise receive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 76-1909A

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.;
MOTOR CARRIERS TRAFFIC ASSOCIATION, INC.;
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
DEFENDANTS

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, INTERVENORS

[Filed Sept. 13, 1979]

FINAL JUDGMENT

Plaintiff, United States of America, and Defendants, Southern Motor Carriers Rate Conference, Inc., ("SMCRC"), Motor Carriers Traffic Association, Inc., ("MCTA"), North Carolina Motor Carriers Association, Inc., ("NCMCA"), all having filed their respective Motions for Summary Judgment on August 1, 1978, and this court on March 20, 1979 having granted Plaintiff's Motion for Summary Judgment and denying all defendants' motions, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

1.

This court has jurisdiction over the subject matter and the parties here involved. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Sherman Act. (15 U.S.C. § 1).

2.

As used in this Final Judgment:

(a) "Tariff" means a publication containing one or more rates, charges, exceptions to the National Motor Freight Classification or alternative publication, rules, regulations, or other provisions or any combination thereof, of one or more common carriers together with supplements or looseleaf page amendments thereto, if any.

(b) "Rates" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service.

(c) "Carrier" means a common carrier of property by motor vehicle.

(d) "General Commodities" means all items of property described in the Southern Motor Carriers Rate Conference, Inc., Alabama Intrastate Tariff 306; Georgia Intrastate Tariff 301 series; North Carolina Intrastate Tariff 304; and Tennessee Intrastate Tariff 305; and all respective supplements thereto and reissuances thereof; the Motor Carriers Traffic Association, Inc., North Carolina Intrastate Tariff 3-H and all respective supplements thereto and reissuances thereof; the North Carolina Motor Carriers Association, Inc., North Carolina Intrastate Tariff 10-H and all respective supplements thereto and reissuances thereof.

(e) "Intrastate for-hire transportation" means the pickup or receipt, transportation and delivery of property for compensation by a motor carrier authorized by a state regulatory agency to engage therein and to serve the general public on a common carrier basis.

(f) "Collective Rates" means any rate or charge, other than a "joint rate," established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers.

(g) "Joint Rate" means any rate established by two or more carriers, covering an interline movement of property over the routes of the carriers directly participating in the interline movement.

(h) "Intrastate Rate Committee" means any group of carriers' agents, employees or other representatives which formally or informally meet with defendants' employees to discuss or vote upon a change or changes in rates, fares, classifications, rules or regulations published in the intrastate tariffs issued by defendants.

(i) "Docket" means an informational bulletin published by a "tariff publishing agent" to inform and facilitate discussion between competing carriers with respect to the filing of rates for the intrastate for-hire transportation of property.

(j) "Tariff Publishing Agent" means a person duly authorized by a carrier, via a power of attorney on file with a state regulatory commission, to publish and file rates and provisions for that carrier's account in tariffs published in the name of the agent.

(k) "Tariff Watching Service" is a service provided by a tariff publishing agent whereby the agent notifies carriers subscribing to its service of competing carrier and rate bureau changes in their existing

tariffs and rates which have been filed with a state regulatory commission.

(l) "Intrastate rate" means any rate charged by a carrier for the intrastate for-hire transportation of property solely within a state and subject to regulation by that state.

(m) "Person" means any natural person, firm, partnership, association, corporation, or any other business or legal entity.

3.

The provisions of this Final Judgment are applicable to the defendants herein and shall also apply to each of the defendants' officers, directors, agents, employees, subsidiaries, successors, and assigns and to all other persons in active concert or participation with them who shall have received actual notice of this Final Judgment by personal service or otherwise; provided however, that nothing in this Final Judgment shall be read or construed to restrain or prohibit any state body, official or employee from acting in accordance with or pursuant to valid statutory authority.

4.

Defendants SMCRC, MCTA, and NCMCA are hereby enjoined and restrained from:

(a) Entering into, adhering to, maintaining, or claiming any rights under, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize or maintain collective rates charged by competing carriers for the intrastate for-hire transportation of property;

(b) Maintaining any intrastate rate committee to consider, pass upon or discuss intrastate rates or rate proposals;

(c) Inviting, coordinating or providing a forum, including publication of a docket, for any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property;

(d) Providing information to any carrier about rate changes ordered by any other carrier employing the publishing services of any defendant prior to the time at which such rate change becomes a matter of public record;

(e) Knowingly publishing or causing to be published any docket, tariff or tariff supplement which was the result of any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property; or

(f) Communicating directly or indirectly any information concerning intrastate rates for competing motor carriers where the purpose or reasonably foreseeable effect of such communication is to maintain or renew, directly or indirectly, any contract, agreement, plan, program, combination or conspiracy to fix, stabilize or maintain rates charged by competing carriers for the intrastate for-hire transportation of property;

(g) Provided however, that nothing in this Final Judgment shall prevent any defendant from engaging in any activity which is judicially or statutorily exempted from the operation of the federal antitrust laws.

5.

Defendants are ordered and directed within six (6) months following the date of the entry of this Final Judgment:

(a) To cancel all tariffs (and any effective supplements thereto) on file with the state regulatory agen-

cies of Alabama, Georgia, Mississippi, North Carolina and Tennessee establishing rates and services for the intrastate transportation of general commodities and to take such action with the said regulatory commissions as may be necessary to effectuate cancellation and withdrawal of said tariffs.

(b) To terminate all previously executed powers of attorney and rate and tariff service agreements between a defendant and any carrier utilizing the services of that defendant authorizing the publication and/or filing of intrastate collective rates within the States of Alabama, Georgia, Mississippi, North Carolina and/or Tennessee.

(c) To cancel those provisions of their respective articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy which have the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Final Judgment.

6.

(a) For those carriers who were or are members of defendants or have participated in defendants' collective tariffs, and who wish to continue to use their services as tariff publishing agents, defendants must offer an "open season" for a period of six months from the date of the entry of this Final Judgment to facilitate the filing of rates independently arrived at by each such carrier. During the "open season," defendants must obtain from each carrier using defendants' services as tariff publishing agents an affidavit which affirms that the new rates filed on behalf of that carrier were arrived at unilaterally by the independent action of that carrier during the "open season" and were not collectively established.

(b) Defendants must not take any steps or adopt any procedures which would have the effect of influencing any carrier from acting independently in establishing its rates in compliance with subsection (a) of this Article 6.

(c) Each defendant may initiate a tariff watching service, but no agreement between any defendant and a carrier for said watching service may include a provision for instituting automatic changes to rates on file for said carrier.

(d) Each defendant may issue one or more tariffs in which the independent rates of competing carriers are published.

(e) Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise in the compiling and publishing of tariffs, including rate justifications for that carrier's independent rate proposal filed with a state agency.

(f) Each defendant may charge carriers for expenses incurred on their behalf.

7.

Defendants are further ordered and directed:

(a) To take reasonable steps for dissemination of, education as to, and compliance with this Final Judgment involving their respective officers, directors, employees and agents having any responsibility in connection with analyzing or publishing tariffs published by defendants, advising such persons of their obligation under this Final Judgment. At a minimum defendants must provide each such officer, director, employee and agent within thirty (30) days of the entry of this Final Judgment with a copy of this Final Judgment, a statement of that defendant's compliance

policy under the Final Judgment in the form of an appropriate company manual or memorandum and shall obtain a written statement from each such officer, director, agent, or employee evidencing the receipt and understanding of these documents, such statements to be retained in the files of the defendants.

(b) For a period of five (5) years from the entry of this Final Judgment, each defendant must provide each new officer, director, agent and employee with a copy of this Final Judgment and a statement of the defendant's compliance policy hereunder in the form of an appropriate company manual or memorandum and must provide any carrier desiring to utilize defendant's services as a Tariff Publishing Agent with a copy of this Final Judgment. Each defendant must obtain a written statement from each officer, director, employee, agent, and carrier evidencing receipt and understanding of the applicable documents, such statement to be retained in the files of the defendant.

(c) Within one hundred and eighty (180) days after the date of the entry of this Final Judgment, each defendant shall file an Affidavit of Compliance with the court, and serve a copy thereof to plaintiff, reciting the steps taken to comply with this Final Judgment.

8.

For the purpose of determining or securing compliance with this Final Judgment, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division or his agent, subject to any legally recognized privilege:

(a) On reasonable notice to any defendant made to its principal office duly authorized representatives of the Department of Justice shall be permitted:

(1) Access, during office hours of said defendant, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of said defendants and without restraint or interference from it, to interview officers, directors, employees or agents of the defendants, any of whom may have counsel present, regarding any matters contained in this Final Judgment.

(b) The defendants shall submit such reports in writing, under oath if requested, with respect to matters contained in this Final Judgment as may from time to time be so requested.

No information or documents obtained by the means permitted in this Section 8 shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the executive branch of the plaintiff, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as required by law.

If at any time information or documents are furnished by a defendant to plaintiff, the defendant represents and identifies in writing the material in any such information or documents of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to said defendant prior to divulging such

material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

9.

Jurisdiction is retained by the court for the purpose of enabling any of the parties to this Final Judgment to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

10.

This Final Judgment shall remain in effect for a period of five (5) years from the date upon which it is entered by the court.

IT IS SO ORDERED.

This, the 11th day of September 1979.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN MOTOR CARRIERS
RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS
ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit, Unit "B"

12 pp

REPLY BRIEF OF PETITIONERS

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v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit, Unit "B"**

REPLY BRIEF OF PETITIONERS

Petitioners Southern Motor Carriers Rate Conference, Inc., ("SMCRC"), North Carolina Motor Carriers Association, Inc. ("NCMCA"), and National Association of Regulatory Utility Commissioners ("NARUC"), in presenting the reasons why their petition for a writ of certiorari should be granted, stressed the crucial importance of this case to the regulation of the intrastate rates of motor common carriers by the several states. If left undisturbed, the decision below will require the

dismantling of regulatory schemes which have been in effect in most states for at least three decades. In addition, petitioners pointed out that in the decision below, the majority's use of a formulistic compulsion test to determine whether state action immunity exists led it to an untenable inference, namely, that Congress intended to preempt state law designed to effectuate in intrastate commerce the same policies that federal law is designed to effectuate in interstate commerce. The decision thus completely ignores the concern for federalism first expressed in the antitrust area forty years ago in *Parker* v. *Brown*.[1]

Respondent United States of America has failed to address these concerns in its brief in opposition to the petition. Rather than discussing the important issues which are relevant to a decision on a petition for writ of certiorari, the government has attempted to avoid the federalism issue in its entirety by mischaracterizing this case as another routine application of federal antitrust law. Indeed, the government's brief in opposition is in reality nothing more than an effort to disregard express conflicts which call for resolution by this Court. Failure to resolve these conflicts will result in immediate and unjustifiable interference on a wholesale basis with the regulatory systems of the several states. If anything, the government's strained attempts to distinguish these conflicts on the merits underscore the need for review in this Court.

ARGUMENT

I. State Action

In their petition, Petitioners established that the decision below, if left unreviewed, will have a devastating impact on the regulatory schemes of the five involved states and will establish a precedent for similar dismantling of the regulatory schemes of the other states represented by petitioner NARUC. In response, the government cavalierly suggests

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[1] 317 U.S. 341 (1943).

that "[i]f . . . rate agreements are essential to permit the states effectively to regulate motor carrier rates, the states are free to require such agreements. . . ." Brief of Resp. 16. There are, however, problems with this "solution."

First, as the government concedes: "Petitioners are correct in pointing out that there would presumably be less competition if the states did so, since some carriers now file individual rates." Brief of Resp. 16. Thus, the government is urging this Court to interpret the federal antitrust laws in such a manner that the result will be a lessening of competition within the several states.

Aside from the irony of the government's position, in response to this litigation the states have already adopted provisions in an effort to meet the stringent compulsion test of the District Court. In 1980, following the District Court decision below, the Tennessee legislature amended *Tenn. Code Ann.* § 65-1506 (Cum. Supp. 1981) to authorize its Public Service Commission to establish "collective rate-making procedures." The amendment provides that "all carriers party to [a collective ratemaking] agreement shall be required to comply with [the established] rate-making procedures." Also in 1980, the Georgia General Assembly amended *Ga. Code Ann.* § 68-613 (Cum. Supp. 1981) to require the Public Service Commission to "establish ratemaking procedures . . . which shall include . . . collective ratemaking procedures for the joint consideration, initiation, and establishment of such rates and charges." Amended § 68-613 provides that carriers are "required to comply with such ratemaking procedures." Neither of these compulsory provisions met the test adopted by the Court below.

In any event, it is inconceivable that Congress intended the antitrust laws to be applied in the manner suggested by the government. Only recently, Congress indicated that it was aware of the existing schemes under which the various state provisions relating to collective rate formulation parallel and complement the federal collective ratemaking provisions, and

it made a deliberate determination to maintain the status quo with respect to those schemes. In the legislative history of the Motor Carrier Act of 1980, there is a discussion of collective formulation of intrastate rates *without* specific authorization from the states involved. The following appears at page 29 of the House Report:

> In the bill as originally introduced, there was a provision which prohibited the rate bureaus from docketing or handling rates for intrastate transportation without specific authorization from the states involved. The Committee eliminated this section because it received very little evidence on that particular subject. The Committee intends to continue looking at this area, but for the time being, the status quo should apply with respect to intrastate ratemaking.

H.R. Rep. No. 1069, 96th Cong., 1st Sess. 29, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2311. This recent expression of Congressional intent that "the status quo should apply with respect to intrastate ratemaking" belies the government's contention that the antitrust laws should be interpreted to require the states to adopt anticompetitive compulsory collective ratemaking provisions.

Fundamental to the government's misdirected approach is the statement in its brief that Petitioners have conceded the *per se* unlawfulness of their conduct. Brief of Resp. 4. This is simply not the case and reflects a basic misunderstanding of the issues presented in the petition. Petitioners have maintained from the outset of this litigation that the conduct which is the subject of this lawsuit does not violate the Sherman Act since the state regulatory commissions, rather than Petitioners, in fact set motor carrier rates. The record in this case plainly establishes the active role of the state commissions in analyzing, reviewing and acting upon rate proposals submitted by Petitioners. App. D at 73a. Petitioners SMCRC and NCMCA have conceded for their own part only that they act collectively to formulate rate proposals to be submitted to the state commissions. The collective formulation of rate proposals is an integral part of the state regulatory processes.

Thus is established the basis for Petitioners' state action argument—an argument which does not rest on otherwise unlawful conduct which is exempted from the Sherman Act, but conduct which is not unlawful because it is not within the scope of the Sherman Act as explained in *Parker*. In other words, Petitioners do not seek the benefit of any exemption which undermines the integrity of the federal antitrust laws. Rather, Petitioners respectfully suggest that the conduct at issue here cannot constitute price fixing in light of the federalism limitations on the Sherman Act expressed in *Parker*. Therefore, it should be clear that Petitioners have made no concessions regarding the illegality of their conduct and in fact continue to deny vigorously any such contention.

Moreover, the government is patently ineffective in its attempt to distinguish *Parker* from the case before this Court. Brief of Resp. 14 n.9. The government admits that in the case *sub judice*, "[T]he state regulatory regimes permit carriers to *propose* rates in either a competitive or a collusive fashion. . . ."[2] It is undisputed that the state regulatory commissions may accept, reject or modify the rate proposals. Respondent further admits that in *Parker*, the state made the decision regarding anticompetitive conduct "at the behest of private parties,"[3] but suggest that the private initiative was "immaterial." On the contrary, the similarity between the cases is remarkable and thus the conclusion is inescapable that if the private initiative did not destroy state action in *Parker*, then the same result obtains here. Consequently, there is an unavoidable conflict between *Parker* and the holding of the Fifth Circuit, Unit "B," in this case.

Even more telling is the strained argument made by Respondent in an effort to distinguish this Court's holding in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*[4] First, the government again incorrectly restates Peti-

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[2] Brief of Resp. 14 n.9.

[3] *Id.*

[4] 445 U.S. 97 (1980).

tioners' position by characterizing the conduct at issue as collective rate agreements rather than rate proposals which are subject to state regulatory commission approval. Brief of Resp. 15. Utilizing this faulty premise, the government argues by way of counterpoint that *Midcal* involved a challenge to a state statute.[5] Then, the government asserts that where a unit of government seeks to invoke state action, compulsion is not necessary as long as there is "a clearly articulated and enforced state policy of regulation." Brief of Resp. 16. Indeed, recent cases dealing with units of government as defendants require only the existence of the first prong of *Midcal*—a clearly articulated and affirmatively expressed state policy—in order to invoke state action.[6] The Seventh Circuit, in *Town of Hallie* v. *City of Eau Claire*,[7] stated that active supervision is not required of government subdivisions in light of other enforcement mechanisms which ensure compliance with state policies. This position was echoed by the Eighth Circuit in *Gold Cross Ambulance and Transfer and Standby Service, Inc.* v. *City of Kansas City*,[8] which noted that "municipal officials generally are politically accountable to the citizens they represent" and thus not in need of state supervision. If, as the government contends, *Midcal* is limited in application to units of government and if, as *Hallie* and *Gold Cross* demonstrate, only the first prong of the *Midcal* test is necessary for state action to exist in such cases, the government fails to explain the purpose of the second prong of the *Midcal* test — active supervision by the state. The position taken by the Seventh and Eighth Circuits conflicts with the Fifth Circuit, Unit "B", as well as the position taken by the government in its Brief in Opposition.

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[5] Brief of Resp. 15. The implication that no state interest is at stake where a private party is the defendant is fallacious, as pointed out in the Petition. Pet. 14-15 and 15 n.33. Moreover, it ignores the reality of this case, as recognized by the District Court. Pet. App. 32a n.7.

[6] *E.g.*, *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983); *Gold Cross Ambulance and Transfer and Standby Service, Inc.* v. *City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983).

[7] 700 F.2d at 384.

[8] 705 F.2d at 1014.

Petitioners respectfully suggest that the active supervision requirement, as explained by the Seventh and Eighth Circuits,[9] must be directed at private parties carrying out clearly articulated and affirmatively expressed state policies. Such a position fairly explains the reference to and quotation of *Goldfarb* v. *Virginia State Bar*[10] and *Cantor* v. *Detroit Edison Co.*[11] in the *Midcal* opinion. Petitioners do not contend, as the government suggests, that *Midcal* is inconsistent with or a reconsideration of *Goldfarb* and *Cantor*. Indeed, the results in those two cases are unaltered by applying Petitioners' reading of *Midcal* to the respective facts. *Goldfarb* must be viewed as the first state action case handed down by this Court in the more than thirty years since *Parker* was decided. Since 1975, there have been a series of cases in which the state action doctrine has matured and evolved. Petitioners merely suggest that *Midcal* represents the Court's refinement of *Goldfarb* into a more flexible and practical test that allows the federal courts to better respond to the complexities of state regulation. The Eighth Circuit, in interpreting *Midcal*, has stated:

> [I]n its most recent case involving private conduct, the Supreme Court required, as prerequisite for *Parker* immunity, a state policy to displace competition and active state supervision rather than state compulsion of the challenged practice.[12]

The refusal of the Fifth Circuit, Unit "B", to recognize the evolution of the state action doctrine represents a direct conflict with the holding of this Court in *Midcal*, and with the interpretation of that opinion by the Eighth Circuit.[13]

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[9] 700 F.2d at 384; 705 F.2d at 1014.

[10] 421 U.S. 773 (1975).

[11] 428 U.S. 579 (1976).

[12] *Gold Cross Ambulance*, 705 F.2d 1005, 1012 n.11.

[13] This conflict between the Fifth Circuit, Unit "B", and the Eighth Circuit is in addition to the conflicts with the Seventh, Ninth and District of Columbia Circuits already discussed in the Petition.

Moreover, the pragmatic flexibility of *Midcal* has been recognized in the carefully reasoned and clearly stated decisions of the circuit courts which the government so casually seeks to dismiss as not being in conflict with the rigid interpretation of the state action doctrine adhered to by the Fifth Circuit, Unit "B", in the case *sub judice*. The cases speak for themselves and need no reiteration here to demonstrate the conflicts relied upon in the Petition. Pet. 15-17. However, it is worth noting that the government attempts to distinguish *Turf Paradise, Inc.* v. *Arizona Downs*[14] by observing that the private race track operators engaged in allocation of racing dates had no leeway since either they allocated the racing dates between themselves or the state would do so. But such a situation does not amount to absolute compulsion to violate federal antitrust laws, since the private parties could have opted to let the state handle the matter, thus at once complying with federal and state law.[15]

The government cites the case of *United States* v. *Title Insurance Rating Bureau, Inc.*,[16] apparently for the proposition that permissive legislation cannot provide the basis for a state action claim. It is important to note that *Title Insurance* involved solely a private defendant to whom the Ninth Circuit, without any mention of a compulsion prerequisite, did apply the two-prong *Midcal* test, thus reaffirming the conflict with the holding of the Fifth Circuit, Unit "B", here. The holding of the *Title Insurance* case—that there was no clearly articulated and affirmatively expressed state policy to displace competition—is hardly analogous here in light of a significantly different fact pattern highlighted by a clear legislative state-

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[14] 670 F.2d 813 (9th Cir., 1982), *cert. denied*, 456 U.S. 1011 (1982).

[15] This argument points up the absurdity of Respondent's literal compulsion requirement: "Moreover, as the court of appeals noted, where the decision to compete or not is left to the private party, it can comply with both the federal antitrust laws and state regulatory laws." Brief of Resp. 12.

[16] 700 F.2d 1247 (9th Cir. 1983) *cert. pending*, No. 83-154.

ment of neutrality as to competition in the title insurance industry.[17] Moreover, the ramifications of any factual distinctions are addressed more appropriately in a brief on the merits should the Court determine to grant a writ of certiorari.

II. Noerr-Pennington

The government is incorrect in its assertion that this Court would have to overrule *Georgia* v. *Pennsylvania R.R. Co.*[18] in order to uphold Petitioner's *Noerr-Pennington* claim. *Pennsylvania Railroad* is a procedural case which holds that the authority of a state to maintain a civil suit under federal antitrust laws extends to suits by it as *parens patriae* as well as to suits for the protection of its proprietary interest. The complaint alleged the Defendant had utilized unlawful means, including coercion, in furtherance of a conspiracy to discriminate against the plaintiff State of Georgia in freight rates. In dicta, the Court stated that such a conspiracy would be unlawful. The Court did not hold that all collective rate publication by the railroads, without more, was a *per se* violation of the Sherman Act.

Petitioners wholeheartedly agree with the government's assertion that the principal objective of *Noerr-Pennington* is to protect the flow of information to public officials. However, rather than limiting the flow of information as suggested by the government (Brief of Resp. 20 n.14), the collective formulation of rate proposals provides more comprehensive and accurate data to state regulatory commissions in a far more useful format than would be the case with hundreds of individual filings. Individual carriers lack the resources to provide the commissions with the extensive analysis now provided by Petitioners, thus hindering the decision-making process. The government fails to perceive that quality of information flow is at least as important as quantity. Indeed, the states have suggested that they would be virtually paralyzed in the face of hundreds of individual motor carrier rate filings.

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[17] *Id.* at 1253.

[18] 324 U.S. 439 (1945).

It is the drastic impact of this case on the states which to a large extent necessitates and justifies issuance of a writ of certiorari. The government has failed conspicuously to address this issue in its brief.

CONCLUSION

For all the reasons set forth herein, Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, Unit "B".

Respectfully submitted,

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SUPPLEMENTAL BRIEF OF PETITIONERS

11pr

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit, Unit "B"

SUPPLEMENTAL BRIEF OF PETITIONERS

Petitioners Southern Motor Carriers Rate Conference, Inc. ("SMCRC"), North Carolina Motor Carriers Association, Inc. ("NCMCA"), and the National Association of Regulatory Utility Commissioners ("NARUC"), file this Supplemental Brief in support of their pending Petition for Writ of Certiorari, pursuant to Supreme Court Rule 22.6. Petitioners file this Supplemental Brief to call to the Court's attention significant factual developments related to the Petition which were not known to Petitioners at the time of their last filing herein.

On September 2, 1983, Petitioners filed their Reply Brief in support of the pending Petition. Shortly thereafter, members of Petitioner NARUC advised their organization that transportation regulatory commissions in certain states had recently received written requests from the United States Department of Justice for information regarding the regulation of motor carrier rate bureaus. The specific requests made to the Washington Utilities and Transportation Commission are attached in Appendix A. To date, fourteen states listed in the footnote have notified Petitioner NARUC that they have received requests substantially identical to that contained in Appendix A.[1] The appended letter from Elliott M. Seiden, Chief, Transportation Section, Antitrust Division to the Washington Utilities and Transportation Commission (Appendix A at 1a -2a) begins by purporting to summarize the holding of the court below in the case at bar. The letter goes on to state that the Antitrust Division is "interested in ascertaining the identity of states in which such rate bureaus operate and the precise nature of their activities." (*Id.*). This interest is pursued "to implement our law enforcement responsibilities. . . ." (*Id.*). Attached to the letter is a four-page questionnaire seeking specific information and documents concerning the details of state regulation of motor common carriers.

Petitioners have been unable to discover from the Justice Department the exact scope of this investigation. Employees at the Department have declined to answer such inquiries. It is apparent, however, that the Government is pursuing a nationwide investigation of motor common carrier rate bureau activities, using the decision

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[1] The fourteen states are as follows: Arkansas, California, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, Ohio, Oklahoma, Oregon, Texas, Washington and Wyoming.

of the court below as its basis. Presumably, such an investigation will lead to nationwide enforcement activities.

Petitioners bring this matter to the attention of the Court to underscore the tremendous national importance of the present case. Petitioners stated this point in their original Petition. In its Reply, the Government did not deny the national importance of the case, as indeed it could not, given its plans to utilize the decision on a nationwide basis even before this Court has had an opportunity to make its determination on the pending Petition for Certiorari.

CONCLUSION

Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

U.S. Department of Justice
Washington, D.C. 20530

EMS:LRW
60-384-168

24 Aug 1983

Washington Utilities and Transportation Commission
Highways-Licenses Building
Olympia, Washington 98504

To the Commission:

On April 11, 1983, the Fifth Circuit Court of Appeals (sitting *en banc*) held that the collective ratemaking activities of three motor carrier rate bureaus constituted a *per se* violation of Section 1 of the Sherman Act. The court specifically held that the state action exception to the antitrust laws was not available to the rate bureaus because they were not compelled by the states in which they operated to engage in collective ratemaking. *United States* v. *Southern Motor Carriers Rate Conference*, No. 79-3741 (5th Cir. Unit B, April 11, 1983).

We are interested in ascertaining the identity of states in which such rate bureaus operate and the precise nature of their activities. It has come to our attention that such organizations may operate in Washington and may engage in activities similar to those pursued by the defendants in the *Southern Motor Carriers* case. In order to implement our law enforcement responsibilities, we are interested in learning the nature and extent of Washington state statutes and regulations that govern or relate to rate bureau activity. Accordingly, we would be very grateful for your response to the attached questions, together with the provision of any relevant supporting documents. We would hope to have your reply by September 21, 1983. If you believe information in addition to that requested would be helpful, please provide it.

If you have any questions concerning this letter, please call Ms. Rangeley Wallace, an attorney in the Transportation Section of the Antitrust Division at (202) 724-6655. Thank you for your attention to this matter.

Sincerely,
/s/ Elliott M. Seiden
ELLIOTT M. SEIDEN
Chief
Transportation Section
Antitrust Division

Enclosure

SCHEDULE OF DOCUMENTS AND INFORMATION REQUESTED

Please provide answers to the following questions and supporting documentation where requested or where you believe it would be helpful.

1. State whether any state statute, order, opinion or regulation compels, authorizes or allows surface common carriers of passengers or freight to collectively establish rates. Provide copies of all relevant regulations, orders, opinions or statutes.

2. State whether any or all common carriers are required to establish rates collectively to operate in Washington. If so, state whether any modes of transportation are exempt from the requirement for collective ratemaking. Provide copies of all relevant regulations, orders, opinions or statutes.

3. State whether any state statute, order, opinion or regulation compels or requires that all rates charged by carriers offering similar or identical services be uniform. Provide copies of relevant statutes, orders, opinions or regulations.

4. State whether a carrier that belongs to a rate bureau * may exercise a right of independent action. If so, describe how and at what stage during the ratemaking process such action may be taken. State whether there are any circumstances in which firms are prohibited from exercising a right of independent action. State whether a carrier or the rate bureau must give advance notice to other carriers of a carrier's intention to take independent action. Explain whether an individual carrier may petition the commission to authorize a rate other than

---

* We are interested not only in corporate rate bureaus, but also in any group or association which is composed of two or more competing carriers and which engages in collective ratemaking. The term "rate" is meant to include all fares, rates and charges for the transportation of passengers, baggage or property and for all services rendered in connection therewith.

that proposed by the bureau. State whether rate bureaus have the right to protest, over-rule or cancel a member carrier's independent action. State whether the commission has the power to disapprove an independent action. If so, state whether the commission has ever rejected the rates filed in an independent action, and how often. Provide copies of any regulations, orders, opinions or statutes relating to the right of independent action.

5. State whether a carrier may otherwise exempt itself from a collectively determined rate. State whether a carrier may file a tariff independently of the rate bureau structure. If so, describe the circumstances and provide copies of any relevant regulations, orders, opinions or statutes.

6. State whether rate bureaus are allowed to submit a rate (or rates) on behalf of an individual carrier. If so, describe the circumstances. State whether rate bureau members are allowed to file selective (or specific) rate changes which supplement the collectively determined rate. If so, describe instances in which this has occurred and provide copies of any relevant statute, order, opinion or regulation. State whether rates proposed by rate bureaus are always the result of collective ratemaking.

7. State whether participating carriers are required to file a collective ratemaking agreement with the commission before they can participate in discussions and collective decisions. If so, describe briefly the requirements for a valid collective ratemaking agreement. State whether a collective ratemaking agreement has ever been disapproved. State whether the commission investigates whether a rate bureau complies with the terms of its ratemaking agreement. If so, state how the Commission proceeds with such an investigation, and briefly describe the reasons for, and the results of, any investigations conducted since 1980.

8. State whether the commission otherwise supervises the activities of rate bureaus. (For example, state whether a commission representative attends ratemaking meetings, and

whether transcripts are made of such meetings.) Provide the number of employees who constitute the commission's rate staff. Provide copies of any statutes, orders, opinions or regulations which relate to commission supervision of rate bureau activities.

9. State whether the rates established or proposed by rate bureaus become effective automatically. State whether the commission holds hearings on the rates, and if so, under what circumstances. Explain to what extent the commission is involved in evaluating the reasonableness of rates filed by rate bureaus, and whether a rate bureau is required to submit data or studies in support of a rate change. State what data or studies are required. Describe how frequently the commission refuses or rejects rates filed by rate bureaus. Provide the number of proposals reviewed and rejected since 1980. Provide also the number of proposals automatically accepted without review since 1980 and, of those reviewed, the number that are general rate increases.

10. To the extent not provided in response to other questions, provide copies of any rules, regulations, opinions or statutes pertaining to the establishment, operation, or regulation of rate bureaus.

11. To the extent not provided in response to other questions, provide copies of any rules, regulations, opinions or statutes pertaining to collective ratemaking.

12. Provide a list of all rate bureaus setting intrastate rates that have operated in Washington since 1980 and a general description of each bureau. Include in the general description the type of transportation service or services offered by the member firms, the number of members, the rate bureau's address and yearly revenue, the amount of tonnage transported intrastate and the number of ton miles traveled by rate bureau members. State whether the rate bureau members also engage in interstate commerce and whether the rate bureau has ICC approval.

Office - Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS

No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 27, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1922

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

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JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 17, 1976 - Plaintiff's Complaint filed in U.S. District Court for the Northern District of Georgia, Atlanta Division.

December 8, 1976 - Answer of Defendant Motor Carriers Traffic Association, ("MCTA") and Motion of MCTA to Dismiss, filed.

January 17, 1977 - Answer of Defendant North Carolina Motor Carriers Association, Inc. ("NCMCA") and Motion of NCMCA to Dismiss, filed.

January 17, 1977 - Answer of Defendant Southern Motor Carriers Rate Conference, Inc. ("SMCRC") and Motion of SMCRC to Dismiss filed.

March 7, 1977 - Plaintiff's Motion to Strike certain affirmative defenses from Answers, filed.

March 8, 1977 - Stipulation correcting typographical error in Complaint, filed.

July 11, 1977 - Order entered denying Defendant's Motion to Dismiss, granting in part and denying in part Plaintiff's Motion to Strike Certain Affirmative Defenses from Answers and inviting Attorneys General of five states to participate as Amici Curiae.

September 1, 1977 - Motion of the National Association of Regulatory Utility Commissioners ("NARUC") for leave to intervene as Defendant, filed.

September 9, 1977 - Order entered granting NARUC's Motion to Intervene.

September 9, 1977 - Answer of NARUC filed.

September 16, 1977 - Plaintiff's Memorandum in Opposition to NARUC's Motion for Leave to Intervene, filed.

September 19, 1977 - Plaintiff's Motion for Reconsideration regarding intervention by NARUC, filed.

October 21, 1977 - Amicus Curiae Brief of State of Alabama and Alabama Public Service Commission, filed.

October 21, 1977 - Amicus Curiae Brief of State of Georgia and Georgia Public Service Commission, filed.

October 25, 1977 - Amicus Curiae Response of the Tennessee Public Service Commission, filed.

October 25, 1977 - Amicus Curiae Response of the State of Mississippi and the Mississippi Public Service Commission, filed.

October 25, 1977 - Amicus Curiae Brief of North Carolina and North Carolina Utilities Commission, filed.

November 9, 1977 - Motion of National Motor Freight Traffic Association, Inc. ("NMFTA") to intervene as Defendant.

November 16, 1977 - Plaintiff's Memorandum in Opposition to Motion of NMFTA for Leave to Intervene, filed.

December 30, 1977 - Order entered denying NMFTA's Motion to Intervene.

May 10, 1978 - Order granting NARUC's Motion to Intervene as Defendant to represent the five state commissions.

May 8, 1978 - Stipulation of certain facts, filed.

July 31, 1978 - Defendant NCMCA's Motion for Summary Judgment, filed.

August 1, 1978 - Defendant's SMCRC's Motion for Summary Judgment, filed.

August 1, 1978 - Defendant's NARUC's Motion for Summary Judgment, filed.

August 1, 1978 - Plaintiff's Motion for Summary Judgment, filed.

August 2, 1978 - Defendant MCTA's Motion for Summary Judgment, filed.

August 8, 1978 - Amicus Curiae Brief of NMFTA Supporting Defendant's Motion for Summary Judgment, filed.

September 29, 1978 - Order entered deferring Motions for Summary Judgment and granting parties thirty (30) days to brief issues in Order.

March 20, 1979 - Order entered granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

April 4, 1979 - Order entered providing that March 20, 1979 Order is not a final decision for purpose of appeal.

April 25, 1979 - Motions by Defendants SMCRC and NCMCA for Reconsideration of Order of March 20, 1979 filed.

September 13, 1979 - Order entered denying Defendants' Motion for Reconsideration.

September 13, 1979 - Final Judgment entered.

September 21, 1979 - Order entered staying Final Judgment until October 10, 1979.

October 11, 1979 - Order entered granting Defendants' Motion for Stay of Final Judgment pending appeal.

November 9, 1979 - Defendant NCMCA's Notice of Appeal, filed.

November 9, 1979 - Defendant SMCRC's Notice of Appeal, filed.

November 13, 1979 - Defendant NARUC's Notice of Appeal, filed.

April 5, 1982 - Opinion of the Court of Appeals for the Fifth Circuit, Unit B.

April 19, 1982 - Motions for Rehearing *en banc* by SMCRC, NCMCA and NARUC, filed.

June 7, 1982 - Order entered by Court of Appeals directing cause to be reheard by Unit B of Fifth Circuit, *en banc*.

April 11, 1983 - Opinion of the Court of Appeals for the Fifth Circuit, Unit B, *en banc*.

May 6, 1983 - Order of the Court of Appeals for the Eleventh Circuit granting stay of mandate pending petition for writ of certiorari granted through May 30, 1983.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C76-1909A
Filed: 11/17/76

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.;

MOTOR CARRIERS TRAFFIC ASSOCIATION, INC.;

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF FOR VIOLATION OF TITLE 15 U.S.C. § 1, SHERMAN ANTITRUST ACT

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above named defendants, and complaints and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1).

2. Southern Motor Carriers Rate Conference, Inc., is corporation licensed to do business under the laws of the State of Georgia and transacts business and is found within the Northern District of Georgia, Atlanta Division.

II.

DEFINITIONS

3. As used herein, the term:

(a) "General Commodities" means all items of property described in the Southern Motor Carriers Rate Conference, Inc., Alabama Intrastate Tariff 306, Georgia Intrastate Tariff 301, Mississippi Intrastate Tariff 303, North Carolina Intrastate Tariff 304, and Tennessee Intrastate Tariff 305, and all respective supplements thereto; the Motor Carriers Traffic Association, Inc., North Carolina Intrastate Tariff 3-H and all respective supplements thereto; the North Carolina Motor Carriers Association, Inc., North Carolina Intrastate Tariff 10-F and all respective supplements thereto; and all predecessor tariffs of the aforesaid tariffs which were effective within the period covered by this Complaint.

(b) "For-hire transportation" means the pickup or receipt, transportation and delivery of property for compensation by a motor carrier authorized by a federal or state regulatory agency to engage therein and to serve the general public on a common carrier basis.

(c) "Intrastate for-hire transportation" means for-hire transportation between origin and destination points wholly within a state.

(d) "Private transportation" means the transportation and delivery of property by a shipper (manufacturer or merchant) performed with motor

vehicles and personnel under control of the shipper. Such transportation is incidental to the primary business purpose of the shipper and is economically unregulated under federal and state law.

(e) "Person" means any natural person, firm, individual proprietorship, partnership, association or corporation.

(f) "Southern Territory" means the States of Alabama, Florida, Georgia, Kentucky, Louisiana (east of the Mississippi River), Mississippi, North and South Carolina, Tennessee, the southern portion of Virginia, and a small part of West Virginia.

III.

DEFENDANTS

4. Southern Motor Carriers Rate Conference, Inc., (hereinafter referred to as "SMCRC") is made a defendant herein. SMCRC is a corporation organized and existing under the laws of the State of Georgia, and has its principal offices in Atlanta, Georgia. SMCRC publishes and issues intrastate rates applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, respectively, on behalf of motor carriers engaged in intrastate for-hire transportation of general commodities within these states.

5. Motor Carriers Traffic Association, Inc., (hereinafter referred to a "MCTA") is made a defendant herein. MCTA is a corporation organized and existing under the laws of the State of North Carolina, and has its principal offices in Greensboro, North Carolina. MCTA publishes and issues intrastate rates applying within North Carolina on behalf of motor carriers engaged in intrastate for-hire transportation of general commodities within North Carolina.

6. North Carolina Motor Carriers Association, Inc., (hereinafter referred to as "NCMCA") is made a defendant herein. NCMCA is a corporation organized and existing under the laws of the State of North Carolina, and has its principal offices in Raleigh, North Carolina. NCMCA publishes and issues intrastate rates applying within North Carolina on behalf of motor carriers engaged in intrastate for-hire transportation of general commodities within North Carolina.

IV.

CO-CONSPIRATORS

7. Various persons not made defendants herein, participated as co-conspirators with the defendants in the violation alleged herein, and performed acts and made statements in furtherance thereof.

V.

TRADE AND COMMERCE

8. Truck transportation is an important transport mode in the movement of property in the United States. In 1974, approximately 22 percent of all property transported in the United States was moved by motor carriers. If bulk commodities are excluded, truck transportation is the dominant mode utilized for the movement of property in the United States.

9. Motor Carriers engaging in for-hire transportation of property across state boundaries do so under certificates of public convenience and necessity granted by the Interstate Commerce Commission (hereinafter referred to as "ICC") (49 U.S.C.§ 306). Such motor carriers are subject to ICC rate regulation and must establish, observe and enforce just reasonable rates (49 U.S.C. § 316(b)).

10. Two or more motor carriers engaged in for-hire transportation of property across state bounderies may apply to the ICC for approval of a rate agreement and a rate-making conference (49 U.S.C. § 5b(2)). Upon ICC approval, parties to such an agreement made and carried out according to its provisions and terms and in conformity with the terms and conditions prescribed by the ICC are relieved from the operation of the antitrust laws (49 U.S.C. § 5b(9)).

11. The ICC may not in any manner or for any purpose regulate the rates charged for intrastate for-hire transportation of property (49 U.S.C.§§ 302(b) and 316(e)).

12. Motor carriers engaged in intrastate for-hire transportation of general commodities within each of the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, do so under certificates of public convenience and necessity granted by state regulatory agencies in the respective states. Such motor carriers are subject to rate regulation by a state agency and are required to charge just reasonable rates.

13. The respective statutes which provide for regulation of motor carriers engaged in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee do not command, authorize or otherwise provide for the establishment, operation or regulation of rate agreements among such motor carriers or motor carrier rate-making conferences.

14. On or about January, 10, 1956, SMCRC received ICC approval to operate as a ratemaking conference. SMCRC member carriers are parties to rates published by SMCRC for for-hire transportation of property across state boundaries between, and from and to, points in the Southern Territory.

15. On or about October 2, 1957, MCTA received ICC approval to operate as a rate-making conference. MCTA member carriers are parties to rates published by MCTA for for-hire transportation of property across state boundaries between, and from and to, points in the Southern Territory.

16. In 1973, motor carriers which participated in intrastate rates published by SMCRC, MCTA and NCMCA for intrastate for-hire transportation of general commodities derived aggregate revenues thereunder in excess of $80,000,000.

17. Shippers engaging in private transportation across state boundaries utilized motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. Such shippers combine their own private interstate transportation with intrastate for hire transportation to effectuate the necessary movement of general commodities. Upon arrival in one of these states, shippers transfer their freight to one or more of said motor carriers who then transport and deliver the general commodities intrastate to customers and destinations predesignated by the shippers at the commencement of the interstate movement. In this way, general commodities are transported in a continuous, uninterrupted stream from out-of-state origin points to destinations within each of the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. The said motor carriers perform such transportation services in the stream or flow of interstate commerce and constitute an essential and integral part of that flow. Such activities of said motor carriers have a substantial and direct effect upon the aforesaid interstate commerce.

18. For intrastate deliveries of general commodities shipped by shippers engaged in private transportation

across state boundaries, motor carriers charge the intrastate rates published by SMCRC, MCTA and NCMCA applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. In 1975, said motor carriers made such intrastate deliveries to destinations within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee of general commodities valued in excess of $53,930,000 and earned revenues therefrom of approximately $500,000.

19. Shippers utilize intrastate for-hire transportation services of motor carriers within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee to move general commodities from warehouses and distribution centers to customers located in the same state as the warehouse or distribution center. These general commodities are transported from out-of-state origin points to such warehouses and distribution centers for distribution within said states and for reshipment interstate. Shippers also utilize said motor carriers for intrastate for-hire transportation of general commodities, which the shippers manufacture or process within said states, to customers located in the same state as the manufacturing or processing facilities. A substantial portion of the essential raw materials and supplies used directly in the manufacturing or processing of these general commodities moves in a continuous and uninterrupted flow from out-of-state origin points into the manufacturing or processing facilities in each of said states and then as manufactured general commodities are delivered intrastate to customers within said states and to interstate customers.

20. For intrastate deliveries of general commodities from warehouses, distribution centers and manufacturing or processing facilities, said motor carriers charge shippers or shippers' customers the intrastate rates pub-

lished by SMCRC, MCTA and NCMCA applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. Said intrastate shipping charges are factors which influence the national and local product prices of such general commodities and influence supply, demand and other competitive business decisions of such shippers. The intrastate delivery services of these motor carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, said activities of these motor carriers have a substantial and direct effect upon the aforesaid interstate commerce.

21. In 1975, more than $800,315,000 worth of general commodities and an additional amount of general commodities weighing more than 1,300,190,000 pounds were moved by shippers from out-of-state origins into warehouses and distribution centers located within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. From said warehouses and distribution centers said motor carriers delivered intrastate more than $360,794,000 worth of these general commodities and an additional amount of general commodities weighing more than 300,667,000 pounds. During the same year, more than $502,141,000 worth of raw materials and supplies and an additional amount of raw materials and supplies weighing more than 808,941,000 pounds were moved by shippers from out-of-state origins into their manufacturing or processing facilities located within the said states. From these manufacturing and processing facilities, said motor carriers delivered intrastate more than $203,095,000 worth of general commodities and an additional amount of general commodities weighing more than 150,434,000 pounds.

22. Since said motor carriers engage in intrastate for-hire transportation of general commodities in a five-state region comprised of Alabama, Georgia, Mississippi,

North Carolina, and Tennessee, and charge the intrastate rates of SMCRC, MCTA and NCMCA within said region, their transportation services and charges necessarily have a direct and substantial effect on the general commodities which flow across and into this five-state region.

23. Certain motor carriers which engage in intrastate for-hire transportation of general commodities and which charge for this service the intrastate rates published by SMCRC, MCTA and NCMCA applying within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, also engage in for-hire transportation of general commodities across state boundaries. For many of these motor carriers, their system-wide operations—combined interstate and intrastate operations—are directly affected by their intrastate traffic.

VI.

VIOLATION ALLEGED

24. Beginning sometime in the early 1940's, the exact date being to plaintiff unknown, and continuing to the date of this Complaint, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforementioned trade and commerce in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

25. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been

and are that they agree to raise, fix, stabilize and maintain rates charged for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee.

26. In furtherance of the aforesaid combination and conspiracy, defendants and co-conspirators have done and continue to do those things which they have combined and conspired to do, including among other things, the following:

(a) Maintain intrastate rate committees made up of carriers in Alabama, Georgia, Mississippi, North Carolina, and Tennessee to consider and pass upon intrastate rate proposals;

(b) Utilize the personnel and facilities of SMCRC, MCTA and NCMCA for intrastate rate-fixing purposes;

(c) Participate in the collectively set intrastate rates published and issued by SMCRC, MCTA and NCMCA;

(d) Coordinate intrastate rate-fixing activities among SMCRC, MCTA, and NCMCA;

(e) Utilize SMCRC personnel and facilities in Atlanta, Georgia, to compile and prepare traffic studies, cost and other data, charts, testimony, exhibits and rate filings for use in and presentation before state agencies in Alabama, Georgia, Mississippi, North Carolina, and Tennessee in justification of collusively set intrastate rate proposals;

(f) Utilize SMCRC counsel and staff personnel to testify and prosecute collusively set intrastate rate proposals before state agencies;

(g) Utilize the collusively set intrastate rates in Alabama, Georgia, Mississippi, North Carolina and Tennessee and the interstate rates prevailing in the Southern Territory as rate comparisons to

justify collusively set intrastate rate filings before state agencies in each of said states;

(h) Act contemporaneously as members of intrastate rate committees in more than one state;

(i) Participate contemporaneously in more than one of the intrastate rates published and issued by SMCRC, MCTA and NCMCA;

(j) Inform participants in any of the intrastate rates published and issued by SMCRC, MCTA and NCMCA of the rate activities pertaining to all of the states for which SMCRC, MCTA and NCMCA publish and issue intrastate rates;

(k) Carry out the foregoing to advance their mutual economic interests.

VII.

EFFECTS

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the flow of general commodities in intrastate commerce and the transportation of such commodities have been directly, unreasonably, arbitrarily and unlawfully burdened and restrained;

(b) interstate transactions and interstate commerce in general commodities have been directly and substantially affected in an arbitrary, unreasonable, unlawful and burdensome manner;

(c) rate competition among motor carriers in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee has been restrained and suppressed;

(d) rates charged by motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Missis-

sippi, North Carolina, and Tennessee have been raised, fixed, stabilized, and maintained at artificial and non-competitive levels;

(e) shippers patronizing motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee have been deprived of the benefits of free and open competition in the provision of said services;

(f) the consuming public, both nationally and in the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee, who purchase general commodity products have been deprived of the benefits of free and open competition in intrastate for-hire transportation of general commodities within said states.

PRAYER

WHEREFORE, the plaintiff prays:

1. That, pursuant to Section 5 of the Sherman Act, (15 U.S.C. § 5), the Court order summonses to be issued to those defendants not found within the State of Georgia, commanding them to appear and answer the allegations contained in the Complaint, and to abide by and perform such orders and decrees as this Court may make in the premises.

2. That the aforesaid combination and conspiracy among defendants be adjudged and decreed to be an unlawful restraint of trade and commerce in violation of Section 1 of the Sherman Act.

3. That each of the defendants named in this Complaint, its successors, assignees, and transferees, and their respective officers, directors, agents and employees thereof and all persons acting or claiming to act on behalf thereof, and all persons acting in concert therewith, be

permanently enjoined and restrained from continuing, maintaining or renewing, directly or indirectly, the combination and conspiracy hereinbefore alleged, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program, or device having a similar purpose or effect.

4. That defendants SMCRC, MCTA and NCMCA be ordered to cancel all tariffs (and any effective supplements thereto) on file with the state regulatory agencies of Alabama, Georgia, Mississippi, North Carolina and Tennessee establishing rates and services for the intrastate transportation of general commodities and to take such action with the said regulatory commissions as may be necessary to effectuate cancellation and withdrawal of said tariffs.

5. That the defendants SMCRC, MCTA and NCMCA be ordered to cancel those provisions of their respective articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, or statement of policy which have the purpose or effect of suppressing or restricting competition in violation of Section 1 of the Sherman Act by and between motor carriers engaged in for-hire transportation under certificates of authority issued by state regulatory agenices, and that each of these defendants promptly file with the Court and serve on plaintiff a report showing the steps the defendants have taken to comply with that order.

6. That each of the defendants, its successors, assignees, and transferees, and the respective officers, directors, agents and employees thereof, and all persons acting or claiming to act on behalf thereof, and all persons acting in concert therewith, be permanently enjoined and restrained from communicating directly or indirectly any

information concerning intrastate rates for competitor motor carriers, unless required by state statute, where the purpose or effect of such communication is to maintain or renew, directly or indirectly, the combination and conspiracy hereinbefore alleged, or any other combination or conspiracy having a similar purpose or effect.

7. That the plaintiff have such other and further relief as the Court may deem just and proper.

8. That the plaintiff recover the costs of this suit.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

ANSWER OF NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

Filed January 17, 1977

[Caption Omitted in Printing]

NOW COMES DEFENDANT NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC. (hereinafter "NCMCA"), and subject to its Motion to Dismiss the Complaint for Lack of Jurisdiction and its Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted, herewith answers the Complaint as follows:

FIRST DEFENSE

The Court lacks jurisdiction of this matter in that the controversy does not arise under the Constitution, laws or treaties of the United States nor any act of Congress regulating interstate commerce, and by separate Motion NCMCA is moving to dismiss the Complaint.

SECOND DEFENSE

The Complaint fails to state a claim against NCMCA upon which relief can be granted, and by separate Motion NCMCA is moving to dismiss the Complaint.

THIRD DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct not actionable under the antitrust laws of the United States under the "state action" doctrine as developed in such cases as *Cantor* v. *Detroit Edison Co.*, 44 U.S.L.W. 5357 (July 6, 1976), *Goldfarb* v.

Virginia State Bar, 421 U.S. 773 (1975) and *Parker* v. *Brown*, 317 U.S. 341 (1943).

FOURTH DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct not actionable under the antitrust laws of the United States under the "Noerr-Pennington" doctrine. See *UMW* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

FIFTH DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct which is authorized by and protected under the First Amendment to the Constitution of the United States, and such alleged conduct is not actionable under the antitrust laws of the United States.

SIXTH DEFENSE

The claims asserted against NCMCA are grounded upon alleged conduct which is impliedly exempt from the antitrust laws of the United States under 49 U.S.C. § 5(b)(9) and 49 U.S.C. § 302(b), and by separate Motion NCMCA is moving to dismiss the Complaint.

SEVENTH DEFENSE

NCMCA answers the allegations of each numbered paragraph of the Complaint as follows:

1.

NCMCA admits that the Complaint seeks relief under Section 4 of the Sherman Act, but NCMCA denies that it has violated Section 1 of the Sherman Act.

2.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2.

3.

NCMCA admits that paragraph 3 contains certain definitions of terms used in the Complaint, which paragraph does not require an answer; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in said definitions.

4.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4.

5.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5.

6.

NCMCA admits that it is a corporation organized and existing under the laws of the State of North Carolina and that its principal offices are located in Raleigh, North Carolina; NCMCA denies that it "publishes and issues intrastate rates" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supple-

ments which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of remaining allegations in paragraph 6.

7.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7, but NCMCA denies that it has violated Section 1 of the Sherman Act.

8.

Answering paragraph 8, NCMCA admits that "truck transportation is an important transport mode in the movement of property in the United States;" NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 8.

9.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9.

10.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10.

11.

NCMCA admits the allegations in paragraph 11 as relate to motor carrier intrastate transportation.

12.

Answering paragraph 12, NCMCA admits the allegations contained therein with respect to the State of North Carolina; NCMCA is without knowledge or information

sufficient to form a belief as to the truth of the remaining allegations in paragraph 12.

13.

Answering paragraph 13, NCMCA denies the allegations contained therein with respect to the State of North Carolina; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13.

14.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16.

Answering paragraph 16, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 16.

17.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18.

Answering paragraph 18, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 18.

19.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20.

Answering paragraph 20, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members

and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 20.

21.

NCMCA is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22.

Answering paragraph 22, NCMCA denies that there are any intrastate rates "of . . . NCMCA," since intrastate rates for intrastate delivery of general commodities by motor carriers in North Carolina are set by the North Carolina Utilities Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 22.

23.

Answering paragraph 23, NCMCA denies that there are "rates published by . . . NCMCA" and states further that on behalf of its member motor carriers it makes application to the North Carolina Utilities Commission for the setting by the Commission of intrastate rates for intrastate for-hire transportation of general commodities in North Carolina, and the Commission sets said rates; after said rates have been set by the Commission, NCMCA publishes for the convenience of its members and shippers a tariff or supplements which contain the rates as set by the Commission; NCMCA is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23.

24.

NCMCA denies the allegations in paragraph 24.

25.

NCMCA denies the allegations in paragraph 25.

26.

NCMCA denies the allegations in paragraph 26.

27.

NCMCA denies the allegations in paragraph 27.

WHEREFORE, Defendant North Carolina Motor Carriers Association, Inc. prays the Court that the Complaint be dismissed as against it; that all relief sought by plaintiff be denied; that all other relief be denied; that judgment be entered in favor of North Carolina Motor Carriers Association, Inc.; and that this Defendant recover the costs of this action.

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Charles M. Shaffer, Jr.
CHARLES M. SHAFFER, JR.

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[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANSWER

Filed January 17, 1977.

[Caption Omitted in Printing]

NOW COMES the Defendant Southern Motor Carriers Rate Conference (hereinafter SMCRC) and makes this its Answer to the Complaint as follows:

FIRST DEFENSE

In answer to the specific allegations of the numbered paragraphs of the Complaint, this Defendant shows the Court the following:

I

JURISDICTION AND VENUE

1.

In answer to Paragraph 1 of the Complaint, this Defendant admits that the Complaint is filed under Section 4 of the Sherman Act (15 U.S.C. § 4). This Defendant denies the remaining allegations contained in Paragraph 1 of the Complaint, and specifically denies any violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

2.

This Defendant admits the allegations contained in Paragraph 2 of the Complaint.

II

DEFINITIONS

3.

The allegations contained in Paragraph 3 of the Complaint are not factual allegations and require no response. For purposes of this Complaint and this Answer, this Defendant accepts the definitions contained in Paragraph 3 of the Complaint.

III

DEFENDANTS

4.

In answer to the allegations contained in Paragraph 4 of the Complaint, this Defendant denies that it "publishes and issues intrastate rates." Properly stated, this Defendant shows that it issues tariffs in which it publishes rates. In further answer, the remaining allegations contained in Paragraph 4 of the Complaint are admitted.

5.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 5 of the Complaint.

6.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 6 of the Complaint.

IV

CO-CONSPIRATORS

7.

This Defendant denies the allegations contained in Paragraph 7 of the Complaint and specifically denies any violations of the antitrust laws.

V

TRADE AND COMMERCE

8.

In answer to the allegations contained in Paragraph 8 of the Complaint, this Defendant admits that truck transportation is an important transport mode in the movement of property in the United States. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the remaining allegations contained in Paragraph 8 of the Complaint.

9.

Using Plaintiff's definition of "for-hire transportation" as found in Paragraph 3(b) of the Complaint, this Defendant admits the allegations contained in Paragraph 9 of the Complaint.

10.

Using Plaintiff's definition of "for-hire transportation" as found in Paragraph 3(b) of the Complaint, this Defendant admits the allegations contained in Paragraph 10 of the Complaint.

11.

The allegations contained in Paragraph 11 of the Complaint constitute a broad and general statement of a legal

conclusion which this Defendant, for want of information sufficient to form a belief as to the truth or falsity thereof, can neither admit nor deny. In further answer this Defendant shows that the statutes speak for themselves.

12.

Using Plaintiff's definitions of "for-hire transportation" and "general commodities" as found in Paragraph 3(b) and (a) of the Complaint respectively, this Defendant admits the allegations contained in Paragraph 12 of the Complaint.

13.

The allegations contained in Paragraph 13 of the Complaint constitute a broad and general statement of a legal conclusion. The statutes, their interpretation, application and administration by the respective states and state agencies will have to speak for themselves. Accordingly, this Defendant denies the allegations of Paragraph 13 of the Complaint in the premises.

14.

In response to the allegations contained in Paragraph 14 of the Complaint, this Defendant admits that on or about January 10, 1956, it received ICC approval to operate as a rate making conference. The remaining allegations contained in Paragraph 14 of the Complaint are denied. In further answer, this Defendant shows that each member of SMCRC at his election may participate in the tariffs published by SMCRC to the extent that such tariffs apply to the territory in which said member has authority to operate in the transportation of general or specific commodities, as the case may be.

15.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither

admit nor deny the allegations contained in Paragraph 15 of the Complaint.

16.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 16.

17.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 17 of the Complaint.

18.

In response to the allegations contained in Paragraph 18 of the Complaint, this Defendant shows that to the extent that motor carriers which are parties to the tariffs published by SMCRC handle the traffic to which reference is made in the first sentence of Paragraph 18 of the Complaint, the intrastate rates named in those tariffs are charged. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 18 of the Complaint.

19.

In response to the allegations contained in Paragraph 19 of the Complaint and using Plaintiff's definitions of "for-hire transportation" and "general commodities" as found in Paragraph 3(b) and (a) of the Complaint respectively, this Defendant admits that shippers utilize intrastate "for-hire transportation" services of motor carriers within the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee to move "general commodities" from warehouses and distribution centers to cus-

tomers located in the same state as the warehouse or distribution center. This Defendant further admits that shippers also utilize said motor carriers for intrastate "for-hire transportation" of "general commodities," which the shippers manufacture or process within said states, to customers located in the same state as the manufacturing or processing facilities. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the remaining allegations contained in Paragraph 19 of the Complaint.

20.

In response to the allegations contained in Paragraph 20 of the Complaint, this Defendant shows that to the extent that motor carriers which are parties to the tariffs published by SMCRC handle the traffic to which reference is made in the first sentence of Paragraph 20 of the Complaint, the intrastate rates named in those tariffs are charged. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the remaining allegations contained in Paragraph 20 of the Complaint.

21.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 21 of the Complaint.

22.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allegations contained in Paragraph 22 of the Complaint.

23.

For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny that many of these motor carriers, their system-wide operations—combined interstate and intrastate operations—are directly affected by their intrastate traffic. In further answer, this Defendant admits the remaining allegations contained in Paragraph 23 of the Complaint.

VI

VIOLATION ALLEGED

24.

This Defendant denies the allegations contained in Paragraph 24 of the Complaint.

25.

This Defendant denies the allegations contained in Paragraph 25 of the Complaint.

26.

In response to the introductory allegations contained in Paragraph 26, this Defendant denies participation in any combination or conspiracy and further denies that any of its activities have been in furtherance of an alleged combination or conspiracy in violation of the antitrust laws. In response to the allegations contained in sub-paragraphs 26(a) through (k) this Defendant makes the following answers with respect to this Defendant and this Defendant only:

(a) This Defendant admits the allegations contained in sub-paragraph 26(a) of the Complaint.

(b) This Defendant denies the allegations contained in sub-paragraph 26(b) as alleged, and in further answer

shows that the personnel and facilities of SMCRC are used for the purpose of initiating and proposing intrastate rates to the appropriate state regulatory agencies of the states herein involved.

(c) This Defendant denies the allegations contained in sub-paragraph 26(c) of the Complaint.

(d) This Defendant denies the allegations contained in sub-paragraph 26(d) as alleged, and in further answer shows that SMCRC in response to the affirmative direction of the North Carolina Public Utilities Commission has coordinated and continues to coordinate its activities together with those of the other Defendants in the initiation and proposal of intrastate rates to the North Carolina Public Utilities Commission.

(e) In response to the allegations contained in sub-paragraph 26(e) this Defendant admits it has engaged in the activities alleged for the purpose of justifying intrastate rate proposals, but specifically denies any "collusive" activity whatsoever.

(f) In response to the allegations contained in sub-paragraph 26(f) this Defendant admits it has engaged in the activities alleged for the purpose of testifying and prosecuting intrastate rate proposals before state agencies, but specifically denies any "collusive" activity whatsoever.

(g) In response to the allegations contained in sub-paragraph 26(g) this Defendant admits utilization of intrastate rates in effect in the respective states and utilization of the interstate rates prevailing in the Southern Territory as that term is defined in Paragraph 3(f) of the Complaint, as rate comparisons to justify intrastate rate filings before state agencies in each of the said states, but denies that it sets any intrastate rates and specifically denies any "collusive" activity whatsoever.

(h) This Defendant denies the allegations contained in sub-paragraph 26(h) of the Complaint.

(i) This Defendant denies the allegations contained in sub-paragraph 26(i) of the Complaint.

(j) In response to the allegations contained in sub-paragraph 26(j) this Defendant shows that it issues tariffs in which it publishes intrastate rates. In further answer, this Defendant shows that it informs participants in any of the intrastate rates published by it of the rate activities pertaining to all of the states for which it issues tariffs in which intrastate rates are published. For want of information sufficient to form a belief as to the truth or falsity thereof, this Defendant can neither admit nor deny the allega- the *[sic]* with respect to the activities of the Defendants MCTA and NCMCA. In further answer, this Defendant shows that the information it provides to participants in any of the intrastate rates published by it is part of its general bulletin in which it makes full public disclosure of all its activities. Said general bulletin is made available to participants, shippers, the Interstate Commerce Commission and all state public service commissions and public utility commissions in which it publishes rates, and all information contained therein is public knowledge available to the public in general.

(k) This Defendant, being a non-profit organization, denies the allegations contained in sub-paragraph 26(k) of the Complaint.

VII

EFFECTS

27.

This Defendant denies the allegations contained in Paragraph 27 of the Complaint and sub-paragraph (a) through (f) thereunder.

28.

All allegations of the Complaint not hereinbefore specifically answered are denied.

SECOND DEFENSE

"FAILURE TO STATE A CLAIM"

29.

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

THIRD DEFENSE

"LACK OF SUBJECT MATTER JURISDICTION"

30.

The exercise of regulation of the activities alleged in the Complaint to be in violation of the Federal antitrust laws are solely within the jurisdiction of the several states and therefore, beyond the jurisdiction of the Federal courts.

FOURTH DEFENSE

"IMPLIED REPEAL"

31.

The activities alleged in the Complaint to be violative of the antitrust laws are subject to a special regulatory scheme and because of the clear repugnancy between that regulatory scheme and the antitrust laws, the latter are impliedly repealed.

FIFTH DEFENSE

PARKER* v. *BROWN

32.

The activities alleged in the Complaint to be violative of the antitrust laws are exempt therefrom under the doctrine of *Parker* v. *Brown*.

SIXTH DEFENSE

"NOERR-PENNINGTON"

33.

The activities alleged in the Complaint to be violative of the antitrust laws are exempt therefrom by reason of the Noerr-Pennington doctrine.

SEVENTH DEFENSE

"SECTION 5a IMMUNITY"

34.

All activities engaged in by this Defendant in the collective initiation and proposal of intrastate rates conforms in all particulars to the procedures followed in similar activities by this Defendant by which interstate rates are initiated and proposed to the Interstate Commerce Commission, and as such are exempt from the proscriptions of the antitrust laws by virtue of Section 5a of the Interstate Commerce Act (49 U.S.C. Section 5b).

EIGHTH DEFENSE

"UNFAIRNESS"

35.

The participation by the states in the regulation of the activities alleged in the Complaint to be violative of the antitrust laws is so dominant and pervasive that it would

be unfair to hold this Defendant responsible for its conduct implementing said activities.

NINTH DEFENSE

"PRIMARY JURISDICTION"

36.

All matters raised by the allegations of the Complaint are within the primary jurisdiction of the respective federal or state regulatory agencies charged with the exclusive right and duty to regulate such matters.

TENTH DEFENSE

"EXHAUSTION OF ADMINISTRATIVE REMEDIES"

37.

The Plaintiff has failed to exhaust the administrative remedies made available by the respective state regulatory agencies charged with the exclusive power and duty to regulate the matters alleged in the Complaint.

ELEVENTH DEFENSE

"UNCLEAN HANDS"

38.

The Plaintiff comes into Court with unclean hands by virtue of the fact that the activities alleged therein to be violative of the antitrust laws have been conducted by the Defendant with the encouragement and approval of the Plaintiff through the Congress and the administrative agencies thereof for more than thirty (30) years.

WHEREFORE, the Defendant Southern Motor Carriers Rate Conference, Inc., respectfully prays the Court as follows:

(a) that the Complaint be dismissed with prejudice; or

(b) the case by stayed pending the remand of the matters herein to the appropriate federal or state agency under the doctrine of Primary Jurisdiction;

(c) the case be stayed pending the Plaintiff's proper exhaustion of its administrative remedies; and

(d) the cost of the suit be cast upon the Plaintiff; and

(e) such further relief as may be meet and proper in the premises.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STIPULATION

Filed March 8, 1977.

[Caption Omitted in Printing]

IT IS HEREBY STIPULATED AND AGREED by and between counsel for Plaintiff and counsel for Defendants, subject to the approval of the Court, to correct the Complaint in the above captioned case in order to correct a previously undetected typographical error.

The Complaint, through an inadvertent error, refers in paragraph 27(a) to "intrastate" commerce. This should refer to "the flow of general commodities in *interstate* commerce." Therefore, paragraph 27(a) as corrected should read as follows:

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the flow of general commodities in interstate commerce and the transportation of such commodities have been directly, unreasonably, arbitrarily and unlawfully burdened and restrained;

Each of the Defendants having denied paragraph 27 of the original Complaint, it is hereby stipulated and agreed between counsel for Plaintiff and counsel for each of the Defendants that the Answer of each of the Defendants to paragraph 27 shall continue to stand; that the Answer of each of the Defendants to the new paragraph 27 is properly and timely filed; and that no further response by the Defendants is necessary.

A corrected page 11 of the Complaint is attached to this stipulation.

Dated: March 8, 1977

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SO ORDERED

This ____ day of January, 1977

_____

UNITED STATES DISTRICT JUDGE

[ATTACHMENT TO STIPULATION]

(i) Participate contemporaneously in more than one of the intrastate rates published and issued by SMCRC, MCTA and NCMCA;

(j) Inform participants in any of the intrastate rates published and issued by SMCRC, MCTA and NCMCA of the rate activities pertaining to all of the states for which SMCRC, MCTA and NCMCA publish and issue intrastate rates;

(k) Carry out the foregoing to advance their mutual economic interests.

VII.

EFFECTS

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the flow of general commodities in interstate commerce and transportation of such commodites have been directly, unreasonably, arbitrarily and unlawfuly burdened and restrained;

(b) interstate transactions and interstate commerce in general commodities have been directly and substantially affected in an arbitrary, unreasonable, unlawful and burdensome manner;

(c) rate competition among motor carriers in intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee has been restrained and suppressed;

(d) rates charged by motor carriers for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina, and Tennessee have been raised, fixed, stabilized, and maintained at

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

STIPULATION

Filed May 8, 1978

[Caption Omitted in Printing]

It is hereby stipulated by and between the Complainant (Government), on the one hand, and the Defendants Southern Motor Carriers Rate Conference, Inc. (SMCRC), Motor Carriers Traffic Association, Inc. (MCTA) and North Carolina Motor Carriers Association (NCMCA), on the other other, as follows:

1.

No portion of this Stipulation shall be interpreted as constituting an admission by Defendants, or any of them, that any violation of the Sherman Act has occurred; and no portion shall be interpreted as a concession by the Government that no such violation has occurred.

2.

This Stipulation shall bind the parties hereto only in connection with this action, and shall not pertain to nor be controlling in connection with any other judicial or administrative proceeding of any kind whatsoever.

3.

The transportation services furnished by motor common carriers to the public at large are very important to the commerce of the United States. To the extent that those motor common carrier services are provided for the transportation of general commodities in movements across State lines, they are subject to regulation by the Interstate Commerce Commission. To the extent that

those motor common carrier services are performed in the transportation of shipments in intrastate commerce within an individual State, they are subject to regulation by that State.

4.

There is a substantial movement of general commodities by motor common carrier in intrastate commerce within each of the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee. The movements themselves as well as the rates and charges assessed for the transportation of articles in such movements have a "direct and substantial effect on interstate commerce," within the meaning of the Sherman Act.

5.

Some shippers engage in private transportation of their own shipments of general commodities from points outside to points within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee, and there tender such shipments to motor common carriers for further transportation to consignees within the same State as the point of tender, which consignees have been predesignated prior to the commencement of the private transportation. For intrastate deliveries of these general commodities, intrastate motor common carriers charge the interstate rates applicable thereto.

6.

The procedures and practices of the carrier rate committees of the Defendants MCTA and NCMCA with respect to the initiation and proposal of new and amended rates to the North Carolina Public Service Commission, the governmental agency charged by law with the responsibility to regulate rates within North Carolina, for application to intrastate commerce in the State of North

Carolina and the procedures and practices of the carrier rate committees of the Defendant SMCRC with respect to the initiation and proposal of new and amended rates to the respective governmental agencies charged by law with the responsibility to regulate rates in the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee for application to intrastate commerce in said States are to all intents and purposes similar or identical to those followed by the carrier rate committees of the Defendants SMCRC and MCTA with respect to the initiation and proposal of new and amended rates to the Interstate Commerce Commission for application to interstate commerce, which are exempt from the antitrust laws pursuant to Section 5a(9) of the Interstate Commerce Act, 49 U.S.C § 5b(9) (1975).

7.

The Government does not contend in this case that any of the Defendant Conferences or any of the intrastate rate committees of the respective Defendant Conferences have done anything to interfere in any way with the right of independent action of any individual carrier.

SO STIPULATED this 4th day of May, 1978.

For the United States of America
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ROBERT M. SILVERMAN

Judy L. Goldstein
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. C76-1909A

UNITED STATES OF AMERICA

vs.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, *et al.*

ORDER

Filed May 10, 1978.

The Government brings this action pursuant to § 4 of the Sherman Act, 15 U.S.C. § 4, seeking to enjoin and restrain alleged continuing violations by the defendants of § 1 of the Sherman Act, 15 U.S.C. § 1. The Government contends that the three rate conference defendants and other unnamed co-conspirators have engaged in a continuing conspiracy to fix rates for intrastate for-hire transportation of commodities in Alabama, Georgia, Mississippi, North Carolina, and Tennessee. The five states have each accepted the court's invitation to appear as amicus curiae. *United States* v. *Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 52 (N.D. Ga. 1977). Presently before the court is the motion of the National Association of Regulatory Utility Commissioners [hereinafter "NARUC"] to intervene as a party defendant in the action. Plaintiff alone, opposes NARUC's proposed intervention. Before proceeding to the merits of the motion *sub judice*, an introduction of NARUC as an organization and a presentation of movant's and plaintiff's arguments are warranted.

NARUC is a quasi-governmental, nonprofit organization of commissions, boards, and agencies of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands, which are charged with regulation of motor carriers within each respective state or territory. NARUC is recognized in various federal statutes as "the national organization of State commissions. . . ." Interstate Commerce Act, 49 U.S.C. § 305(f); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1673(a)(1); and Federal Communications Act, 47 U.S.C. § 410(c). The organization's official functions include such tasks as presentation of standard forms and procedures for interstate motor carriers for adoption by the Interstate Commerce Commission. 49 U.S.C. § 302(b)(2). Various courts have recognized NARUC's special stature as an organization and have allowed NARUC's intervention in a representative capacity. *E.g.*, *Washington Utilities and Transportation Commission* v. *F.C.C.*, 513 F.2d 1142, 1154 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1976); *National Association Automatic Laundry and Cleaning Council* v. *Schultz*, 443 F.2d 689 (D.C. Cir. 1971); *Lynch* v. *Public Service Commission of Nevada*, 376 F. Supp. 1033 (D. Nev. 1974); *Tenneco Inc.* v. *Public Service Commission of West Virginia*, 352 F. Supp. 719 (S.D. W. Va. 1973), *aff'd*, 489 F.2d 334 (4th Cir.), *cert. denied*, 417 U.S. 946 (1974).

NARUC herein seeks to intervene as a party defendant to present and to defend the rate-setting practices of its five affected state commission members. Plaintiff objects to NARUC's intervention contending: (1) that the association lacks standing on its own or as a representative of the commissions; (2) that NARUC fails to meet the Rule 24(a) requirements for intervention as of right or the Rule 24(b) parameters for permissive intervention; and (3) that NARUC's motion is ultimely and intervention will unduly prejudice the present parties.

Intervention as of right is either: expressly authorized by statute, Rule 24(a)(1); or impliedly available under certain conditions, Rule 24(a)(2). There is no claimed statutory authorization in this instance and NARUC therefore must demonstrate under Rule 24(a)(2): (1) that is holds an interest in the subject matter of the litigation; (2) that its protection of such interest will be impaired or impeded by the outcome of the litigation; and (3) that its interest is inadequately represented by the present parties. *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970), *cert. denied*, 400 U.S. 878 (1971). An underlying prerequisite demands that NARUC show that its application to intervene is tendered in a timely manner to minimize the prejudice of delay to the existing parties. Plaintiffs contend that NARUC must also demonstrate its standing to invervene as a defendant. *Arvida Corp.* v. *City of Boca Raton*, 59 F.R.D. 316, 321 (S.D. Fla. 1973). The court finds that the standing requirements of proof of an "injury in fact," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), within the qualifying "zone of interests." *Association of Data Processing Service Organizations, Inc.* v. *Camp*,.397 U.S. 150, 151 (1970), are subsumed within the Rule 24(a)(2) prerequisites.

The court in determining the propriety of intervention must measure the facts and circumstances presented by each of the recognized prerequisites. *United States* v. *Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978). Intervention as of right first requires a "direct, substantial, legally protectable interest in the proceedings." *Diaz* v. *Southern Drilling Corp.*, *supra*, at 1124. *See* B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 400 (1967). NARUC purports to represent the interests of the five regulatory commissions involved in the challenged ratemaking

collectives. NARUC establishes its representative capacity by reference to the statutory authorization "as the national organization of State commissions . . ." and judicial recognition introduced hereinabove. The organization has been specifically empowered by its southeastern state members to participate on their behalf in this litigation. Resolution of the Southeastern Association of Regulatory Utility Commissioners, reported in NARUC No. 22-1977, May 30, 1977, at 17-18.

The organization may then have the concrete interest or standing as a representative of the five threatened commissions, if in fact the five could have been named as defendants in the first instance. *See Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). The five state commissions clearly could have been named parties. The injury threatened is an alleged dismantling of their entire rate-making structure. A denial of plaintiff's sought remedy will directly affect these five commissions. *See id.* at 515. The court therefore finds that the association, NARUC, has standing to represent the interests of the five members commissions.

NARUC's representation of its five members' interests meets the first two prerequisites for intervention. The interests to be represented are real and substantial, not hypothetical, generalized, or merely contingent. *Compare Cohn* v. *Equal Employment Opportunity Commission*, 569 F.2d 909, 911 (5th Cir. 1978) *with United States* v. *936.71 Acres of Land*, 418 F.2d 551 (5th Cir. 1969) *and Arivda Corp.* v. *City of Boca Raton*, *supra* at 321. Whether these five commissions will be able to continue in their present rate-making routines is an essential question posed in this litigation. A negative answer to this question will necessarily impede or impair the commissions' interest in continued use of the present rate conferences. The answer will not be one of general

policy preference but of immediate legality of the conference system. NARUC's proposed representation of the interests of these five commissions thus satisfies the real interest and potential harm prerequisites of intervention, Rule 24(a)(2).

Plaintiff raises the attempted intervention of the National Association of Women [hereinafter "NOW"] in *United States* v. *Alleghany-Ludlum Industries, Inc.*, 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), in its opposition to NARUC's intervention for want of an adequate and protectable interest in the action. The *Alleghany-Ludlum* decision, however, is not controlling upon the facts and circumstances presented herein. NARUC's proposed intervention is argued under Rule 24(a)(2), nonexpress intervention, while NOW's primary arguments were for intervention under statutory authority, Rule 24(a)(1). *Id.* at 840-45. Upon a secondary argument, NOW was also denied intervention under Rule 24(a)(2) when the court found: (1) that NOW would not be bound by the disputed consent decrees; (2) that NOW's plenary legal remedies remained; and (3) that NOW's possible future intervention was not precluded. The court's findings in *Alleghany-Ludlum* clearly distinguish NOW's proposed Rule 24(a)(2) intervention from the case at hand, as: (1) the represented members' interests in collective rate-making will be decided by the outcome of this action; (2) the commissions' conference form of rate-making will be ettled law in this district, *c.f.*, *In re Penn Central Commercial Paper Litigation*, 62 F.R.D. 341, 346-47 (S.C. N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir. 1975) [controlling effect is limited to the district of decision]; and (3) the court does not now intend to reopen the intervention issue at a later stage in this proceeding. *Alleghany-Ludlum* therefore does not provide the guidance here that plaintiff would assign it.

The third intervention prerequisite of a showing of inadequate representation by the present litigants has also been satisfied by NARUC. Possible areas of inadequacy have been identified by the courts as: (1) collusion between the present representative and an adversary; (2) adverse interests of the representative and the intervenor; and (3) failure of the representative to serve its duty of representation. *Martin* v. *Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969). NARUC in no way disparages the abilities or motives of the named defendants and their counsel but instead notices that the commissions and the present defendants' interests may well be adverse in portions of the possible proof. *See United States* v. *Southern Motor Carriers Rate Conference*, *supra* at 47 [if plaintiff can "demonstrate that defendants' efforts were a mere 'sham' whereby defendants usurped the powers of the state regulatory agency. . ."] Plaintiff's contention that the states as amicus curiae will fully serve the individual commissions' interests is not persuasive. The special status of the states as amicus curiae, a status which they have vigorously fulfilled, does not carry the panoply of rights of participation as a party. For example, the states will be unable to appeal a decision which they regard as adverse. Further, the five affected states themselves have recorded no opposition to NARUC's intervention on their respective commissions' behalf. The third prerequisite, that the commissions' interests are now inadequately represented, is thus satisfied.

The final consideration, that NARUC's motion for intervention be tendered in a timely fashion, has also been met. The parties should suffer little prejudice as NARUC considers and enters into any of the already agreed upon stipulations. The court expects no untoward delay of the litigation by NARUC's intevention at this juncture in the proceedings.

Upon all of the foregoing, therefore, NARUC's motion to intervene as of right as a defendant should be GRANTED. Plaintiff has voiced apprenhension that NARUC will use intervention to lobby for all member commissions. NARUC's entry into this litigation is as a defendant, not as a lobbyist. The controversy before the court concerns three rate-making conferences and five affected states. The action, already complex, will not be extended to other conferences or other states' commissions. NARUC's intervention is permitted only to the extent that NARUC purports to represent the five affected states' commissions. This permission does not preclude reference to general patterns or practice but merely reaffirms the original scope of this action.

Accordingly, NARUC's motion to intervene as a party defendant to represent the five state commissions is hereby GRANTED.

IT IS SO ORDERED.

This, the ____ day of May, 1978.

Richard C. Freeman
RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT NCMCA

EXHIBIT "B"

Filed July 31, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF J. C. TURNER

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Personally before me, the undersigned officer, duly authorized to administer oaths appeared Mr. J. C. Turner, who, being duly sworn, stated on oath of his personal knowlege as follows:

1.

My name is J. C. Turner, and I am a resident of Wake County, North Carolina. I am more than twenty-one years of age, and I am operating under no legal disability. This affidavit is made and sworn to of my personal knowledge for use in support of the Motion for Summary Judgment of Defendant North Carolina Motor Carriers Association, Inc. (hereinafter "NCMCA") or for any other purpose in this litigation.

2.

At the present time, I am Coordinator, Accounting Traffic Section, North Carolina Utilities Commission, PUBLIC STAFF, (hereinafter "Public Staff"). My responsibilities include the analysis of all rate increase proposals for motor common carriers which are submitted to

the North Carolina Utilities Commission (hereinafter "Commission") by the three rate bureaus operating in North Carolina: NCMCA, Southern Motor Carriers Rate Conference (hereinafter "SMCRC"), and Motor Carriers Traffic Association, Inc. (hereinafter "MCTA"). I have had exactly these same responsibilities since July 1, 1971, and I have been involved in the establishment of motor common carrier intrastate rates in North Carolina since July 1, 1971.

3.

The Public Staff, which is supervised by an Executive Director who is appointed by the Governor and confirmed by the General Assembly, represents the using and consuming public in the establishment of public utility rates, including motor common carrier rates, in North Carolina. The Public Staff consists of attorneys, accountants, engineers, economists, and rate specialists. Presently, eighteen (18) members of the Public Staff are directly involved in motor common carrier rates, including the Executive Director, eight rate specialists, three accountants, and six lawyers. These eighteen (18) members are assisted by a clerical staff, and they have access as needed to economists working for the Public Staff. When motor common carrier rate proposals are made by the three rate bureaus, they are reviewed and thoroughly analyzed by the Public Staff.

4.

On April 26, 1977, the General Assembly passed a bill expressly authorizing collective rate-proposing in North Carolina. Pursuant to this bill, the Commission on October 10, 1977, established a procedure for a rate bureau such as NCMCA to obtain approval of its collective rate-proposing in North Carolina. On April 26, 1978, NCMCA

submitted its application to the Commission for approval as a rate conference. The Public Staff reviewed NCMCA's application and has recommended its approval by the Commission.

5.

When an application for a general commodity general rate increase is filed, which would apply across-the-board to all general commodities, the Commission sets the matter down for an investigation and hearing and suspends the proposed rate increase. To my knowledge the only time a hearing has not been held occurred during the 1974 Arab Oil Embargo when an emergency fuel surcharge was allowed on an interim basis. Proposals which are not general rate increase proposals are carefully investigated by the Public Staff prior to its recommendation to the Commission. In those cases where the Public Staff finds in its investigation that conditions surrounding the proposed rate increases are questionable and may be unreasonable or unjustified, it recommends a suspension of the proposed increase and a hearing.

6.

Once a hearing has been set, the Public Staff performs an even more intensive investigation and analysis as to the necessity and cost-justification for the proposed increases. For all rate increase proceedings, the Public Staff requires carriers and their agents to furnish freight bills, financial statements, traffic studies and data processing records for its use in preparing evidence and statements to present at the hearings. Also, on-sight [sic] review and verification of motor carrier books and records are performed by the Public Staff to gather evidence to be used in such rate proceedings. The Public Staff through its investigation verifies the carrier's operating ratios as they are presented by the carriers through their agents, and/or independently determines carrier operat-

ing ratios. For example, when the last request for a motor carrier general rate increase was made, the Public Staff analyzed and audited the SMCRC continuing traffic study freight bill data, carrier annual report data, carrier books and records, and the SMCRC automated traffic costing procedures in order to determine whether the proposed rate increases were necessary. The Public Staff also developed evidence as to the revenues earned by the carriers and the operating ratios experienced by representative carriers.

7.

After its thorough investigation, the Public Staff through sworn testimony presented at the hearing makes recommendations as to the proposed increases. For example, in the last request for a general rate increase by motor carriers, the Public Staff recommended that increases in rates and charges as proposed by the carrier agents be revised and placed on shipment weight groups in a manner quite dissimilar from that proposed by the rate bureaus. For the most part, the Public Staff recommendation was adopted by the Commission.

8.

On occasion, the three rate bureaus may jointly submit at the hearing a rate justification statement prepared for them by SMCRC; however, this rate justification statement has never been controlling on the Commission. During the last seven years, the SMCRC rate justification statement has seldom been accepted in its entirety in connection with a proposed general rate increase. No material portion of this rate justification statement will be recommended as acceptable until such time as the Public Staff has fully investigated the statement and verified its contents.

9.

I have closely observed and participated in the setting of motor common carrier rates in North Carolina and for the past seven years, and I am thoroughly familiar with the manner in which proposals are submitted to the Commission and the manner in which the Commission sets the rates. In my opinion, collective rate-proposing in North Carolina greatly assists the Public Staff in fulfilling its duty and responsibility to adequately protect the using and consuming public in North Carolina. If collective rate-proposing on behalf of the three rate bureas in North Carolina were enjoined by this Court, in my opinion it would have severe and negative consequences on the effective regulation of the motor carrier industry in North Carolina.

J. C. Turner
J. C. TURNER

[Jurat omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT NCMCA

EXHIBIT "C"

Filed July 31, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF I. H. HINTON

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Personally before me, the undersigned officer, duly authorized to administer oaths appeared Mr. I. H. Hinton, who, being duly sworn, stated on oath of his personal knowledge as follows:

1.

My name is I. H. Hinton, and I am a resident of Spring Hope, Nash County, North Carolina. I am more than twenty-one years of age, and I am operating under no legal disability. This affidavit is made and sworn to of my personal knowledge for use in support of the Motion for Summary Judgment of Defendant North Carolina Motor Carriers Association, Inc. (hereinafter "NCMCA") or for any other purpose in this litigation.

2.

At the present time, I am Director, Transportation Division of the North Carolina Utilities Commission (hereinafter "Commission"). My responsibilities include the review of general rate increase proposals for motor common carriers which are submitted by the three rate

bureaus in North Carolina: NCMCA, Southern Motor Carriers Rate Conference (hereinafter "SMCRC"), and Motor Carriers Traffic Association, Inc. (hereinafter "MCTA"). I have had these responsibilities since 1958, and I have been involved in the establishment of motor common carrier intrastate rates in North Carolina since 1949.

3.

The Commission has been accepting and acting upon collective rate proposals by the three rate bureaus since 1943. In 1949, the Commission requested that the three rate bureaus submit their proposals with the same effective date. Rule 4-4(b) of the Commission, which has been in effect since 1945, provides that applications for permission to change or establish rates on less than statutory notice must be made "by the carrier or the agent holding authority to file the proposed publication." Since 1947, legislation in North Carolina (now Code Section 62-270 of the Public Utilities Act of North Carolina (hereinafter "Act")), has provided that service of orders and notices may be made upon the carrier involved or "agent who has filed a tariff or schedule in behalf of such carriers." Pursuant to this legislation, the Commission has since 1947 been routinely sending orders and notices to the three rate bureaus on behalf of their member carriers. From 1947 until the present time, approximately ninety (90%) percent of the general commodity motor carrier rate proposals to the Commission have been made by the three rate bureaus on behalf of their member carriers.

4.

On April 26, 1977, the General Assembly passed a bill expressly authorizing collective rate-proposing in North Carolina. A certified copy of this bill is attached hereto and made a part hereof as Exhibit 1. Pursuant to this bill,

the Commission on October 10, 1977 established a procedure for a rate bureau such as NCMCA to obtain approval of its collective rate-proposing in North Carolina. A certified copy of the Commission Order of October 10, 1977, is attached hereto and made a part hereof as Exhibit 2. On April 26, 1978, NCMCA submitted its application to the Commission for approval as a rate conference, and the Commission approved NCMCA's application on July 24, 1978. A certified copy of the Commission Order approving NCMCA's application is attached hereto and made a part hereof as Exhibit 3.

5.

Since 1945 the Commission has been establishing motor carrier rates in North Carolina. At the present time, the Commission has an annual budget of $3,400,000.00 to carry out the regulation of public utilities including motor carriers in North Carolina. The Commission now has a staff of seventy-five (75) employees, including attorneys, accountants, engineers, and rate specialists who assist in setting rates, including the undersigned in my capacity as Director of Transportation Division of the Commission. The Commission also includes a separate Public Staff of eighty-five (85) employees who are independent of the Commission. This Public Staff, which is supervised by an Executive Director who is appointed by the Governor and confirmed by the General Assembly, represents the using and consuming public in the establishment of public utility rates including motor common carrier rates in North Carolina. The Public Staff consists of attorneys, accountants, engineers, economists, and rate specialists. Presently, eighteen (18) members of the Public Staff are directly involved in motor common carrier rates, including the Executive Director, eight rate specialists, three accountants, and six lawyers. These eighteen (18) members are assisted by a clerical staff, and they have access

as needed to economists working for the Public Staff. When motor common carrier rate proposals are made by the three rate bureaus, they are reviewed and thoroughly analyzed by the Public Staff.

6.

When any motor carrier rate proposal is made by the three bureaus, it is submitted to the Chief Clerk of the Commission, and a copy is distributed to the undersigned on behalf of the Commission and to the Public Staff. A general rate increase proposal is one that would apply across-the-board to all general commodities; and if the proposal involves a general rate increase, a copy of the proposal is also distributed promptly to each of the seven (7) Commissioners on the Commission. After the proposal has been filed, the Public Staff thoroughly analyzes and reviews the proposal on behalf of the consumers and users in North Carolina. If the Public Staff deems it necessary, it will request that the Commission set the matter down for a hearing, which suspends the effective date of the rate proposal. With the exception of an emergency fuel surcharge allowed on an interim basis to motor carriers during the 1974 Arab Oil Embargo, to my knowledge, there has never been a motor carrier general commodity general rate increase granted by the Commission without a hearing before the Commission.

7.

When the Public Staff requests a hearing on a rate proposal, the Commission will set the matter down for a hearing and distribute notice of the hearing date to all interested parties and to the press. The procedure at the hearing is the same whether the proceeding involves a general rate increase proposal or other rate proposals and tariff adjustments. When a general rate increase proposal

is involved, this matter is either heard by the Commission en banc or by a panel of three (3) Commissioners. The hearing is open to the public and evidence may be submitted by any interested party including the applicant, any protestant, any intervenor and the Public Staff on behalf of the consumers and users. The Attorney General of North Carolina has a separate utility division which also actively participates in general rate cases in North Carolina, including those affecting motor carrier rates.

8.

Where a general rate increase proposal is involved, the three rate bureaus may submit to the Commission at the hearing a rate justification statement in support of the proposal, and this statement may contain information about rates in other states. However, this statement and the rates in the other states are not controlling on the Commission as to its decision, and the facts in the statement are verified by the Public Staff before they are given any probative value at the hearing.

9.

The Commission does not "rubber stamp" rate increase proposals or any other proposal. For example, in December, 1969, the three rate bureaus on behalf of their members sought a general rate increase of approximately 75% which would equalize North Carolina intrastate motor carrier rates with the interstate motor carrier rates. After hearing before the Commission, this rate proposal was denied and the Commission authorized the rate increase not to exceed 15%. The active role of the Commission in setting rates is also revealed in the general rate increase proposed by the three rate bureaus in 1971, when they sought a rate increase ranging from 3% on truckload shipments to 30% on less-than-truckload shipments. After a hearing before the Commission, the Com-

mission entered an order denying the rate increase proposal in its entirety. The motor carriers appealed this decision to the Court of Appeals of North Carolina, which affirmed the denial of any rate increase in the case of *State of North Carolina, Ex. Rel. Utilities Commission, et al* v. *Motor Carrier Traffic Association, Inc., Agent, et al*, 16 N. C. App. 515, 192 SE2nd 580 (1972). A third example of the significant role of the Commission in setting rates took place in 1975. The motor carriers on May 3, 1975, sought an immediate rate increase of up to 19%. After a full investigation by the Commission (now Public Staff) and a hearing before the Commission, the Commission allowed the rate increase up to 19% but not until February 1, 1976, nine months after the proposal was made.

10.

I am thoroughly familiar with the manner in which proposals are submitted to the Commission and the manner in which the Commission sets the rates. To my knowledge, there has never been a general rate increase proposal on general commodities by motor carriers in North Carolina that has not been suspended by the Commission and thoroughly investigated by the Commission (now Public Staff); and, with the exception of the emergency fuel surcharge allowed on an interim basis to the motor carriers during the 1974 Arab Oil embargo, to my knowledge, there has never been a motor carrier general commodity general rate increase granted by the Commission without a hearing before the Commission.

11.

There are approximately six hundred (600) motor common carriers in North Carolina, and intrastate motor carrier rates in North Carolina are approximately 25% below interstate motor common carrier rates. I have closely observed the setting of motor carrier rates in North Carolina for the past twenty (20) years. If collec-

tive rate proposals by the three rate bureaus in North Carolina are enjoined by this Court, in my opinion, it would have severe consequences on the Regulation of the motor carrier industry in North Carolina. All carriers would be put to the added expense of preparing and filing individual rate proposals and maintaining individual tariffs, which added expense would be reflected in higher rates to the shippers. While large carriers might be able to absorb these increased administrative expenses, they would have a severe adverse effect on small carriers. Furthermore, small carriers would run the risk of domination by larger carriers who could transport products on a volume basis. Shippers would also be put to the increased administrative expense of maintaining additional personnel to analyze the numerous rate proosals brought about by individual tariff filings and to contest proposals before the Commission. Finally, the staff and budget of both the Public Staff and the Commission would have to be greatly increased in order to properly handle the greatly increased individual rate proposals and tariff filings.

I. H. Hinton
I. H. HINTON

[Jurat and Exhibits Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

***AMICUS CURIAE* BRIEF [OF NMFTA] IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

ATTACHMENT I

Filed August 8, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF JAMES C. HARKINS

INTRODUCTION

My name is James C. Harkins and I am the Executive Director of the National Motor Freight Traffic Association, Inc. (NMFTA). I have been working in transportation for over 20 years, always in a capacity having to do with the matter of rates and ratemaking. My experience covers three years of work with the railroad industry; 10 years with a manufacturing and shipping company; and 10 years with the regulated motor carrier industry. Since 1957 I have been directly involved in the matter of ratemaking and rate negotiation on both sides of the table: as a representative of a shipper and as a representative of regulated motor carriers. For over 20 years I have been involved in the negotiation of motor carrier rates and have a thorough knowledge of the system of collective ratemaking.

From the point of view of the shipper, collective ratemaking enables effective negotiation of rates while providing assurance that other shippers, including their competitors, are not gaining an unfair advantage. From the view of the carrier, collective ratemaking permits negotiation with shippers; promotes through service be-

tween all of the points in the United States at a rate level that is competitive with all other regulated common carrier service; and enables a carrier to meet their service obligations as dictated by law. The advantages of collective ratemaking are equally manifest on the intrastate level and the interstate level. Below, I will detail the workings of a part of the ratemaking process—the setting of commodity classifications—and will describe how the transportation system and the public benefit from the collective action of carriers in establishing a uniform classification.

The NMFTA is an association which has a membership of almost 3,000 motor common carriers and serves these carriers (and 2,000 others including railroads, freight forwarders and water carriers) in an important function of pricing—a function called commodity classification.

I. The Nature Of Classification

But what is a commodity classification? Simply, it is the grouping of all commodities hauled by motor common carriers which, because of their similar transportation characteristics, merit similar transportation rates. See *Director General* v. *Viscose Co.*, 254 U.S. 498 (1921). The grouping of commodities injects into the ratemaking system a vehicle for providing equitable treatment for the hundreds of thousands of products moving in commerce. As the ICC said in *Classification of Canned Goods*, 98 I.C.C. 166, 176 (1925): "Classification is largely a matter of comparison of all commodities that move as freight and the assignment of ratings such that each shall bear its fair share of the transportation burden." The benefits of so apportioning transportation costs so that "each shall bear its fair share of the transportation burden" were recognized in the earliest days of transportation regulation:

> "It was, therefore, seen not be be unjust to apportion the whole cost of service among all the articles trans-

> ported, upon a basis that should consider the relative value of the service more than the relative cost of carriage. Such method of apportionment would be best for the country, it would be best for the railroads, because it would build up a large business, and it would not be unjust to property owners, who would thus be made to pay in some proportion to benefit received. Such a system of rate-making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid upon it." (ICC First Annual Report to Congress, p. 31).

Classification is also a means for injecting simplicity into what would otherwise be a nightmarish rate structure. There are in excess of 117,000 points in the United States served by almost 15,000 regulated motor common carriers which haul over 15,000 separate articles of commerce. To establish individual rates for every product moving between any two of these places would create an astronomical number of rates. As described below, classification makes the system workable.

The Classification published by NMFTA, known as the National Motor Freight Classification (NMFC), divides all commodities into 23 possible categories, or ratings. Each of these ratings is a numeric factor which is reflective of approximate percentages of bureau published rates for Class 100 (known as First Class)—e.g., Class 70, Class 125. For each article moving in commerce, the Classification lists a truckload (TL) rating, a less-than-truckload (LTL) rating, and a minimum weight. See sample page attached hereto as Appendix A. The minimum weight is established in combination with the truckload rating. It states the minimum quantity of a particular commodity which must be tendered to the carrier to entitle the shipper to the generally lower TL classification rating. There are some 20 minimum weight factors in

the NMFC which convert to some 20 truckload minimum weights ranging from 10,000 pounds to 50,000 pounds.

The ICC, in numerous proceedings, has set forth factors which are to be used in determining appropriate classification ratings—*i.e.*, determining the transportation characteristics of commodities. In Ex Parte No. MC-22, *Motor Carrier Rates In New England*, 47 I.C.C. 657 (1948), the Commission established the following list—

(1) Shipping weight per cubic foot

(2) Liability to damage

(3) Liability to damage other commodities with which it is transported

(4) Perishability

(5) Liability to spontaneous combustion or explosion

(6) Susceptibility to theft

(7) Value per pound in comparison with other articles

(8) Ease or difficulty in loading or unloading

(9) Excessive weight

(10) Excessive length

(11) Stowability

(12) Care or attention necessary in loading and transporting

(13) Trade conditions

(14) Value of service

(15) Competition with other commodities transported

While the ICC has stated that no one of these characteristics is predominant over the others, the density characteristic has generally been accorded greater weight than

the others. The lighter and bulkier the commodity, the greater the charges per hundred pounds required to recover the cost of transporting it.

Of course, the consideration of any of the factors which define transportation characteristics cannot be done pursuant to a formula. Rather, classification is more an art than a science and ultimately human judgment plays a key role in classification decisionmaking. And the classification requires constant reevaluation in light of changes in product design, materials, packaging, etc. As a result, frequent supplements are issued amending classification ratings to reflect these changes.

The NMFC plays a pivotal role in the system which determines motor carrier rates. Most motor carrier traffic, both interstate and intrastate, moves on the basis of class rates. These class rates, generally established by the collective action of carriers through rate bureaus such as the Defendants, are no more than mileage rates expressed in cents per hundred pounds for each of the 23 classification ratings. The class rates are stated in tables with vertical and horizontal tables. (See Table attached as Appendix B). One scale reflects the various classification ratings. The opposite scale reflects rate base numbers—a number which reflects distances between given origins and destinations. Therefore, in order for a carrier or shipper to determine the class rate under which a shipment is hauled, he needs to check the NMFC rating and the applicable rate basis.

Classification, is therefore, a ratemaking tool; "A rating must be complemented by a class rate, and vice versa, in order to give substance to either." *Class Rate Investigation*, *supra*, at 473. To chage [sic] the classification of an article in the NMFC from Class 100 to Class 110 is to increase by approximately 10 percent the class rates in

the tariffs published by the Defendant rate bureaus. Since this is so, classifications are governed by the same regulatory standards as are rates. Thus, the Interstate Commerce Act makes it the duty of every common carrier to establish and maintain just and reasonable classifications. Section 1(4), 49 U.S.C. § 1(4), railroads; Section 216(b), 49 U.S.C. § 316(b), motor common carriers; Section 305(a), 49 U.S.C. § 905(a), water common carriers Section 404(a), 49 U.S.C. § 1004(a), freight forwarders. In addition, the Act forbids unjust discrimination against, and undue or unreasonable preference, advantage, prejudice, or disadvantage to, any person, port, gateway, locality, region, district, territory, or description of traffic any respect whatsoever. Sections 2, 3(1), 49 U.S.C. §§ 2, 3(1), railroads; Section 216(d), 49 U.S.C. § 316(d), motor common carriers; Section 305(c), 49 U.S.C. § 905(c), water common carriers.

II. History Of Classification

Classifications have existed in one form or another since the early nineteenth century. In 1813 the Sheffield Canal in England established six classes of commodities, to each of which was applied a different rate in pence per ton mile. Grouped in one class were such diverse commodities as coal, limestone, manure, turnips, carrots and potatoes. In another were pig iron, pig lead, bricks, old ropes, bones and "hoofs." In another were steel, cast iron, various fruits, and "all kinds of green groceries" not named elsewhere. In another were "dry groceries, and all kinds of manufactured goods." In another were corn, grain and malt. The last, to which the highest rate was applied consisted of "all other goods, matters, and things."

Some of the early American classifications, developed for railroads and water carriers are discussed in Colquitt,

The Art and Development of Freight Classification, wherein the following example is provided:

> In 1864, the Michigan Southern & Northern Indiana R. R. issued a "Revised Classification of Articles," using 4 classes. However, the articles were not grouped under each class but were listed alphabetically. Not yet had commercial groups, or generic headings such as we used today in our classifications, become generally estalished. This issue contained the class rates, also "Special Rates" and specific commodity rates. This publication consisted of 22 pages.

As the number of commodities hauled by rail grew and as the operations of each line became more complex, so grew the impetus for the development of a uniform system of freight classifications. By 1918, the three major regional rail classification publishing organizations were consolidated in a single publication known as the Consolidated Freight Classification; a publication which retained to some degree the differences in the regional rail classifications. By 1945, the Commission ordered the establishment of a uniform rail classification applicable nationwide. *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945). The Commission so acted out of the need to bring greater order to the rate structure based on the classification—the class rate structure. The problem created by more than one classification was thus summed up by the Commission in its report as follows:

> The situation created by the diversity of ratings and classes in the several classifications, the lack of uniformity in percentage relations between the classes, and the designation of classes in the classifications by different numbers or letters, have combined to compel the establishment of countless exceptions which have shorn the ratings in the classification of much of their usefulness and proper function. This is shown by the fact that the volume of

> traffic, particularly in carloads, moved at class rates subject to ratings in the classifications is relatively small both intraterritorially and interterritorially, and is considerably less than that moved at rates under exceptions. It is clear that the existing classifications are outmoded and should be revised. (262 I.C.C. at 504).

Since "the basic considerations which should determine the classification of an article . . . are generally the same in all territories," the Commission found that a uniform classification would be both feasible and fair. As a result, the railroads issued, in 1952, the Uniform Freight Classification No. 1.

Paralleling this development of a unified rail classification was the development of a unified motor carrier classification. The trucking industry grew rapidly after 1900 and, by 1935, was a large enough competitive threat to the railroads to warrant enactment of the Motor Carrier Act of 1935, now codified as Part II of the Interstate Commerce Act. Section 216 of the Act mandates that motor carriers shall establish a just a reasonable classification. NMFTA's operations are designed to meet this statutory mandate.

III. The Role and Organization of NMFTA

Prior to the enactment of Part II of the Interstate Commerce Act in 1935, the motor carrier industry was unregulated as to interstate traffic. Many individual motor carrier classifications had appeared on the scene. Part II of the Interstate Commerce Act required the newly regulated carriers to "establish, observe, and enforce just and reasonable *rates, charges and classifications*. . . ." (Emphasis added). The then existing National Traffic Committee of the industry decided to coordinate the existing motor carrier classifications and follow

the format of the then existing rail classifications, changing it wherever necessary to fit as nearly as possible the needs of the motor carrier industry. The National Motor Freight Classification No. 1 was then born and became effective in April, 1936.

In the early 1940s the possibility of violation of the antitrust laws by collective action on the part of transportation agencies in matters of rates was entertained by the Justice Department. Because of the world-wide war then going on the federal government, acting pursuant to executive fiat, granted carriers the right to collectively discuss rates, charges, classifications since it was considered in the best interests of the war effort. With the cessation of hostilities the Justice Department again proceeded to investigate the possibility of antitrust violations. Congressional action designed to legitimize collective carrier action was undertaken an on June 17, 1948, the Reed-Bullwinkle Act was passed granting carriers immunity from antitrust action when collectively considering changes in rates, fares, *classifications*, divisions, allowances or charges . . . or rules and regulations pertaining thereto." (Emphasis added). This Act was incorporated into the Interstate Commerce Act as Section 5a, providing for carrier immunity under "such rules and regulations as the Commission may prescribe" after application to, and approval by, the Commission of carrier agreements.

The National Traffic Committee of American Trucking Associations decided that an autonomous corporate entity should be created to permit the carriers' joint consideration and maintenance of just and reasonable classifications of property. The corporation created for this was NMFTA.

The Certificate of Incorporation of NMFTA cites as its purposes:

"The particular business and objects of said corporation shall be educational and scientific with respect to matters relating to or affecting motor common carriers of property by motor vehicles operating within the United States.

"The purposes shall further be the mutual improvement and advancement of the interests and welfare of those engaged in such common carriage by motor vehicle.

"In furtherance of the above purposes, NMFTA is mandated to:

(1) Investigate, analyze and disseminate information with respect to classifications, tariffs, charges, rates, rules, regulations and practices governing the transportation of property or wholly or in part by motor vehicle.

(2) As agent for the carriers participating therein, compile, distribute, issue, publish, file or contract for the compilation, publication, filing, sale and distribution of classifications, tariffs, charges, rates, rules, regulations and practices governing the transportation of property, together with supplements thereto and revisions thereof, solely as the same from time to time be directed by the National Classification Committee.

(3) Constitute the National Classification Committee as a Standing Committee of the Corporation pursuant solely to the National Motor Freight Classification Agreement, plenarily and exclusively charged with the construction, initiation and establishment of classifications, charges, rates, rating, rules, regulations, and practices pertaining thereto or procedures for the joint consideration, initiation or establishment of classifications, charges, rates, ratings, rules, regulations, and practices pertaining thereto or procedures for the joint consideration, initiation or establishment thereof.

(4) Procure, analyze, compile and disseminate treatises, statistics, studies, reports, and information with respect to the operations, accounts, revenues, expenses, costs, traffic and rates of carriers, but not to perform any functions of a carrier or a public accountant.

(5) Take and do such other act or acts, consonant herewith, as may be necessary to promote the welfare and interests of its members."

Of particular interest in the context of this proceeding is the National Classification Committee (NCC). The NCC is the arm of NMFTA which operates pursuant to the antitrust immunity granted by Section 5a. The NCC agreement for collective classification making was approved by the Commission in a proceeding styled *National Classification Committee - Agreement*, 299 I.C.C. 519 (1956).

The NCC consists of 100 members (motor carrier employees) elected by the Classification participants from each of the 48 contiguous United States, Alaska, the District of Columbia and Canada. The number elected from each state is determined by the Classification participation fees received from carriers domiciled in that state. The NCC is reconstituted on July 1 of each year.

The NCC is empowered to:

(a) Investigate, consider and make recommendations with respect to matters affecting the classification of commodities and finally decide, fix and prescribe the context, provisions and ratings of the National Motor Freight Classification; provided, however, that any carrier participating in such Classification shall have the right, at any time before or after determination thereof, to publish, cause to be published, or to concur in any tariff or tariffs containing exceptions to said Classification and any or all provisions thereof;

(b) Determine the procedure under which the National Classification Board (NCB) shall operate, appoint members of the NCB and determine and fix the procedure under which appeals from decisions of the said NCB shall be heard and decided.

NCB is composed of not less than three and not more than seven full-time employees, one of whom is Chairman. The NCB considers proposals for changes and additions in the description of articles, minimum weights, packaging requirements, ratings, rules or regulations in the National Motor Freight Classification (NMFC), holds public hearings, and recommmends the disposition of proposals. It is the NCB which daily works with the fifteen transportation characteristics above listed to arrive at the proper classification relationships between articles of commerce.

How are changed made in the Classification? This is a very important part of proper maintenance of the Classification, as the commodities moving in commerce are constantly changing in character and there is a daily introduction of many new items. To provide for these changes the Section 5a Agreement sets forth the ICC approved procedures for the establishment of, or changes in, ratings, rules, packaging, etc. Anyone, be it shipper, carrier, governmental agency, or individual, has the right under those procedures to initiate a request for change in the Classification. The action may start with the proponent filing a proposal with the NCB, describing the desired change and supporting it with information. That proposal is received by the NCB and public notice is given of the filing in a Docket Bulletin which is published and receives wide distribution. In that Bulletin, advice is given of the dates on which public hearings will be held with reference to the items listed in the Bulletin. At the time of the public hearing all interested parties have the

right to appear and present their views, pro or con. After the hearings have been concluded the NCB evaluates each proposal and issues a public disposition, either approving, disapproving or approving a modified version of an original proposal. The public disposition is sent to all parties of record in the docket, also being published in a wide circulation of trade journals. If the proponent or any other interested parties takes issue with the dispositon, procedures are provided for that party to appeal to the 100 members elected by the NCC. The NCC has the authority of final decision over the NCB.

In addition to the setting and amending of classifications, NMFTA publishes rules relating to said classifications and charges for various accessorial services rendered in the course of transportation. Again, these rules and charges, like the classification, apply on both interstate and intrastate traffic. A typical page of rules published in the NMFTA tariffs is provided in Appendix C. Typical rules provide packaging specifications, set forth bills of lading forms, and define the procedures to be followed for the filing of claims against carriers.

Intrastate Application Of The NMFC

The NMFC is filed as the governing intrastate classification tariff with the state motor carrier regulatory commissions of 46 states (all states excluding Delaware, Rhode Island, Hawaii and Massachusetts). In the states in which it applies, the NMFC is employed in the ratemaking process in the same manner as it is employed on an interstate basis—*i.e.*, it is used in conjunction with individually or collectively established class rates in those states, such as those class rates published by Defendants. The NMFC published in these states for application on intrastate traffic is identical to that published for interstate application. It is the product of the same collective process described above.

As regards the states involved in this lawsuit, NMFC is published for the intrastate account of the following numbers of carriers:

Alabama Public Service Commission for appplication by 50 carriers;

Georgia Public Service Commission for application by 66 carriers;

Mississippi Public Service Commission for application by 33 carriers;

North Carolina Public Service Commission for application by 225 carriers; and

Tennessee Public Service Commission for application by 75 carriers.

Attach [sic] hereto as Appendix D is the cover page of an NMFC tariff indicating the various state regulatory bodies with which the NMFC is filed and a sample list of participating intrastate carriers for the State of Alabama.

The Necessity Of A Uniform Freight Classification

The primary need for a uniform freight classification derves from the requirement that carriers establish rates which are just, reasonable and lawful in relation to one another. Each jurisdiction in which the NMFC is filed, both federal and state, statutorily requires carriers to establish just, reasonable and non-discriminatory rates and classifications. Such a requirement mandates the need for some structure of rates which are lawful in relation to one another. Absent a uniform classification, such a structure would be impossible. It would be impossible to avoid discrimination between shippers moving like products under like transportation conditions. It would be impossible to avoid discrimination between places located in different classification territories. And it would be impossible to assure that similar commodities are accorded similar rates.

There is another basic reason for a uniform classification: workability. Collective action greatly simplifies a pricing function that must be capable of billing over 200 million shipments a year, or about 800,000 shipments per working day. As the ICC has noted:

> By the use of the classification in conjunction with the class tariff, it is possible for carriers to publish reasonable charges for transporting all articles of commerce between all points in the United States without the necessity of publishing billions of separate and distinct rates. *General Increase - Eastern Central Territory* 316 I.C.C. 467, 483 (1962).

Thus, a shipper could not effectively distribute his products if they were to be subject to different classifications depending on which carrier it would or wishes to utilize. Just to give an example, when one wishes to make a long distance telephone call from Atlanta to Washington, one need only dial the phone and the through service is provided at a predetermined cost. It isn't necessary that the local phone company connect you with the lines of the several phone companies that provided the connecting through service to Washington. It is done automatically, on a through basis.

The same is true for a shipper who wishes to ship his commodities by motor vehicle from Newman, Ga to Pocatello, Idaho. There is no regulated motor common carrier tha has single-line service between those two points but the shipper knows that he can utilize the services of a local Atlanta area carrier who will take his shipment and deliver it to a carrier at Atlanta, Georgia for final transport to Pocatello, Idaho. The shipper also knows that he too can predetermine the price and charges for that service—all because the present system of collective rate and classification making enables carriers to jointly provide this service and jointly establish the

charges that will permit the service to be carried on in a simple, economical, just and reasonable manner.

Moreover, a uniform classification is a practical necessity. Simply stated, the task of publishing, maintaining and distributing a classification is so immense that no single carrier could feasibly perform it; no one carrier could bear the burden involved in classifying, in a just and reasonable manner, over 15,000 separate articles. Nor could states monitor each separate classification filed for compliance with statutory standards. The immensity of the task would simply be too great and the number of regulatory personnel needed beyond the means of any regulatory body.

The same reasons which underlay the need for a uniform interstate classification underlay the need in each state for a uniform freight classification applicable to intrastate traffic. Simply, a uniform classification is the best means that regulatory bodies can employ to assure that statutory standards of just and non-discriminatory rates are met, and it is the only means whereby carriers can meet those standards. This is a conclusion which each of the states that regulate transportation has reached and, it is a conclusion which has prompted 46 of those states to apply to the NMFC to intrastate traffic.

CONCLUSION

The foregoing has provided a summary of the activities of NMFTA in the matter of collective classification making, indicating the manner in which NMFC is an integral part of the collective ratemaking system. The effectiveness of this system in terms of enabling a basic and simple method of pricing and billing over 200 million shipments each year was demonstrated. It was likewise shown that the pricing system also guarantees for treatment to all

who purchase motor common carrier transportation. That is to say, shippers will be charged at a price that is just and reasonable and does not discriminate or give undue preference to any shipper or class of shippers.

What would happen if the carriers' granted exemption from antitrust laws were removed and they had to work out another way to price their services? One must appreciate the tremendous influence this would have on the thinking of the members of the trucking industry and its customers as well. The overwhelming threat of antitrust prosecution with its attendant penalties would be a major force in directing their activities in such a manner as to absolutely insure beyond any doubt that their pricing system would be irreproachable. No uniform classification could exist in such an atmosphere. As shown, the consequences of that result would be a tangled mess of conflicting classifications; a situation which would at worst, end interlining and, at best, hopelessly confuse interlining. And, in some cases, the result would be no Classification at all, at least not a coordinated or meaningful classification based on knowledge and experience. This is a situation which no regulated motor carrier system could tolerate.

VERIFICATION

CITY OF WASHINGTON)
)ss:
DISTRICT OF COLUMBIA)

James C. Harkins, being first duly sworn, deposes and says that he has read the foregoig affidavit, knows the facts asserted therein, and that the same are true as stated.

James C. Harkins
JAMES C. HARKINS

[Jurat and Exhibits Omitted in Printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REPLY OF NARUC TO MOTION OF U.S. FOR SUMMARY JUDGMENT

ATTACHMENT A

Filed September 15, 1978.

[Caption Omitted In Printing]

AFFIDAVIT OF ANDREW C. RYMER DIRECTOR, MOTOR CARRIER DIVISION TENNESSEE PUBLIC SERVICE COMMMISSION

I, Andrew C. Rymer, being first duly sworn according to law, depose and state as follows:

1. I am the Director of the Motor Carrier Division of the Tennessee Public Service Commission and as such am fully familiar with the rules and regulations of the Commission and the actual practice of the Commission which relate to and constitute the exercise by the Commission of its regulatory authority over the motor common carriers of property operating in intrastate commerce within the boundaries of the State of Tennessee.

2. All of the aforesaid operations by the motor common carriers of property are conducted pursuant to operating authority duly granted by the Commission and all applications by either existing or new motor carriers for additional or new operating authority must be first granted by the Commission before such proposed operation may be lawfully commenced.

3. The charges assessed by the motor common cariers of property within the State of Tennessee are fixed by the Commission and the procedures whereby that is done have been in existence for many years, resulting in a

currently effective structure of rates and charges, rules, regulations, classifications, and practices which have all been specifically prescribed or approved by the Commission.

4. Although the statutes of Tennessee do not specifically require the motor common carriers to join with each other in the provision of service over through routes at joint rates, they do authorize the Commission to fix such rates. The statutory authorization is quoted below:

> "65-518. The Commission shall have power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-401, whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates tolls, fares, charges or schedules, or commutation, mileage or other special rates, the commission shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility. (Acts 1919, ch. 49, § 4; Shan. Supp., § 3059a87; Code 1932, §§ 5450; Acts 1974 (Adj. S.), ch. 470, § 1.)"

5. By voluntary action the motor common carriers operating within Tennessee have joined with each other in the provision of through service at joint rates over their connecting lines, particularly in the transportation of class-rated traffic.

6. There is a requirement by statute that the charges to be assessed for the services of the motor carriers shall

be stated in tariffs filed with the Commission pursuant to such reasonable regulations as shall be prescribed. By Rule No. 1220-2-1.11, all freight tariffs of motor carriers are required to contain the rules and regulations which govern the tariff and set forth the privileges and services covered by the rates. When class rates are published, a classification must be published or adopted in which all articles or commodities of commerce are arranged alphabetically and a class shown for each to which such article or commodity has been assigned. All rates must be expressed in terms of lawful money and the points from and to which the said rates apply must be clearly shown.

7. The class rates mentioned above are published and maintained by the carriers for application to transportation for which specific commodity rates have not been published. As such, class rates apply to almost all of the less-than-truckload traffic, which by its very nature consists of a wide range of articles and commodities and moves between almost all of the traffic centers in Tennessee. As of the present time, all of the motor carriers providing less-than-truckload service within Tennessee utilize a single classification which lists the multitudinous articles of commerce in alphabetical order and assigns to each a specific class reflecting its transportation characteristics, including its density, its value, its ease or difficulty of handling to and from trucks and across platforms, its susceptibility to damage, and ten or a dozen other features which affect the cost of its transportation or the ability of the article to bear the transportation charges demanded by it. The rates assigned to the separate classes of traffic thus determined are applied to both single-line and joint-line transportation of those commodities. As such, both the rates and the classification are the product of group action, either by way of prescription or by way of proposal.

8. By reason of their long subjection to regulation, all of the motor carrier rates published in the tariffs which are now effective have been specifically prescribed or approved by the Tennessee Commission. By Rule No. 1220-2-1-.12, any change to be made in those tariffs must be accompanied by a new filing made at least 30 days prior to the proposed effective date and with full notice to all known interested parties. Each such filing must be accompanied by an explanation of the character of and the reason for the proposed change in the existing tariff schedules.

9. Without reference to whether or not a formal opposition to a proposed change in tariffs is filed with the Commission by a shipper or other interested person, each proposed change is fully and analyzed by the staff in the Motor Carrier Division of the Commission.

10. By statute each proceeding before the Commission involving the fixing of rates is deemed to be a contested case (Acts 1953, ch. 162, § 1 (Williams) § 5501-24) and, also by statute (Acts 1953, ch. 162 §§ 6 and 8 (Williams §§ 5501.29 and 5501.31)), all interested parties may become parties to the proceeding and thereby become entitled to an opportunity for hearing after reasonable notice. An opportunity is afforded each such party to present evidence and argument in accordance with the rules of the Commission provided, however, that informal disposition may also be made of any of these by stipulation, agreed settlement, consent order, or default. However, every final decision or order rendered by the Commisision in a contested case must be in writing and must contain or include in the record a statement of the findings of fact and conclusions of law upon which the Commission's decision rests.

11. In actual practice, general changes in motor carrier rates are seldom proposed by individual carriers. When individual carriers do propose rate changes, they usually seek to establish commodity rates to reflect real or fancied savings in operating costs arising from a regular movement or some extraordinary circumstances enabling the carrier to accord to the particular traffic a lower charge than that called for by the class rate structure. On the other hand, any changes made in the class rate structure, or a proposal for a general increase in the level of the class rates generally, usually is the product of a collective proposal by the carriers. As above indicated, in either instance the matter is analyzed and, with a full report, is referred to the Commission for disposition.

12. The collective action of the carriers in developing and submitting proposals to the Tennessee Public Service Commission is intimately related to the performance by the Commission of its regulatory duties. It is doubtful that those duties would be performed at all in the absence of such proposals. For example, if each motor common carrier of property operating within Tennessee were to be required to file with the Commission its own freight classification, separate and distinct from that filed by every other carrier, the task of regulation would become intolerable.

13. Because of the intimate relation of joint or collective action by the motor carriers to the entire regulatory process of the Tennessee Public Service Commission, the Commission promulgated Rule No. 1220-2-1-.40, reading as follows:

> "1220-2-1.40 The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for

> the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; provided, however, that the final determination on any rates, fares, classifications, divisions, allowances, charges, rules and regulations or procedure shall be left in its final determination to the Tennessee Public Service Commission."

This procedure benefits the Commission in several ways. First, the filing of joint tariffs permits the Commission and its staff to review one document rather than as many documents as there are regulated carriers. Second, joint tariffs assist the Commission in furthering the statutory directive that rates should be uniform. Third, the centralization and coordination of tariff information decreases the amount of time spent in hearings thus enabling the Commission to use its time and resources more efficiently. Fourth, the use of joint tariffs aids the Commission in docket control in that these tariffs enable the Commission to conduct hearings and render decisions more expeditiously. Finally, the use of joint tariffs results in the centralization of tariff information concerning not only rates but also which carriers serve what routes and communities.

The use of joint tariffs which is permitted by Rule 1220-2-1.40 also benefits the shippers as well as the carriers. First, the use of joint tariffs results in the centralization of rate and route information. The Commission is not required to publish or compile tariffs; it only requires that tariffs be maintained at the shipper's place of business. Second, this compilation and centralization of tariff information enables small shippers who may be ignorant of the availability of service to determine what

routes and rates are most favorable to their business. Third, the use of joint tariffs has permitted the wide development of "through rates" which would have been more difficult to develop if only individual rates could be considered. The availability and use of "through rates" tends to keep the cost of shipping lower than it would be if only individual tariffs could be used.

14. Insofar as the class rates themselves are concerned, collective proposals by the carriers are also essential if the applicability of the rates themselves over both single and joint-line routes is to be maintained. The maintenance of such applicability is itself a desirable regulatory goal in that it widens and encourages service competition between and among single-line and joint-line carriers, thus contributing to the adequacy and avilability of satisfactory motor carrier service at reasonable and nondiscriminatory charges. At the same time, it contribute to market accessibility for producers and distributors.

15. The practical effect of regulation of motor common carriage of property within the State of Tennessee has been to control the competition of the carriers between and among themselves insofar as the pricing of their services is concerned while, at the same time, promoting to the maximum extent possible service competition between and among those same carriers. The net result has been a stable rate structure which avoids undue discrimination, provides the public with good service at reasonable charges, and permits the carriers to earn a reasonable reward for the dedication of their efforts and property to public use.

Andrew C. Rymer
ANDREW C. RYMER

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REPLY OF NARUC TO MOTION OF U.S. FOR SUMMARY JUDGMENT

ATTACHMENT A-1

Filed September 15, 1978.

[Caption Omitted in Printing]

AFFIDAVIT OF ROBERT A. JONES

STATE OF ALABAMA

COUNTY OF MONTGOMERY

Personally before me, the undersigned officer, duly authorized to administer oaths, appeared Mr. Robert A. Jones, who, being duly sworn, stated on oath of his personal knowledge as follows:

1.

My name is Robert A. Jones. I reside at 107 Sterling Drive, Montgomery, Alabama. I am over twenty-one years of age and I am operating under no legal disability. This affidavit is made and sworn to of my personal knowledge for use by the National Association of Regulatory Utility Commissioners or for any other purpose in this litigation.

2.

I am presently employed by the Alabama Public Service Service Commission (hereinafter "Commission") as Supervisor of Transportation Rates and Services. I have held this position since November, 1966. Except for a very brief period prior to my employment with the Commission I have been engaged in the transportation field,

having worked with railroads, motor carriers, private industry and traffic consultants. Practically all of my working experiences relates directly to transportation rates and services. I am a registered Interstate Commerce Commission practitioner and hold a Bachelor of Laws degree.

3.

In my present position, I serve as the director of the Commission's Bureau of Transportation Rates and Services. This bureau is primarily responsible for matters relating to the rates and charges, services and related practices of all modes of surface transportation other than pipeline. In addition to secretarial and railroad safety personnel, this bureau has three employees who, like the director, devote most of their time and efforts to matters relating directly to transportation rates, charges and services. This bureau reports directly to and works very closely with the Commission in all of its activities, especially in keeping the Commission informed and handling matters relating to motor carrier rates and charges.

4.

As of June 1, 1978, there were 350 motor carriers authorized by the Commission to operate in Alabama intrastate for-hire transportation. 279 hold certificates as common carriers and 71 hold permits as contract carriers; in addition to their common carrier authority, 24 common carriers also hold permits as contract carriers. All of these carriers are required to file with the Commission either their tariffs which set forth all of their rates and charges or their schedules of minimum rates. Only contract carriers may file schedules of minimum rates; however, many of them have elected to publish or participate in tariffs which are much more comprehensive than schedules of minimum rates. The motor carrier tariffs are

published and filed by the carriers individually or by their agents. I have observed that practically all of the general commodity carriers of consequence participate in agency tariffs; however, some of them also publish individual tariffs of a limited nature to provide for a few specific commodities or specific movements. Very few general commodity carriers publish individual class and/or general commodity tariffs. A number of the carriers who are either authorized to transport only one or a very limited number of commodities, many within a relatively small area or from and to only a few points or origin and/or destination, publish individual tariffs.

5.

The Commission was charged with the duty of regulating for-hire motor transportation upon the enactment of the Alabama Motor Carrier Act of 1939, which, as amended, is now Chapter 3 of Title 37, Code of Alabama 1975. The Commission is charged not only with the duty of regulating the rates and charges of the motor carriers but most other areas of their operation, including entry, service, safety, accounting systems, etc. The Commission is charged with the duty of regulating motor carriage to the end that the State of Alabama will be provided with a transportation network which is operated in a safe and efficient manner and is adequate to meet the needs of the public. To carry out these duties, the Commission has, as required, promulgated extensive rules and regulations, including specific rules applying to filing of tariffs and schedules publishing the carriers' rates and charges and rules and regulations affecting their rates and charges.

6.

The motor carriers do not actually establish their rates and charges by the filing of their tariff and/or schedules; from a practical standpoint, they file what they propose to

be put into effect. The Commission actually establishes the rates and charges because it must approve all tariff filings. To this end, upon the receipt of these tariffs or, supplements thereto, our staff studies them for changes in rates and charges or rules and regulations affecting the rates and charges and makes rate comparisons and analyses. The staff keeps the Commission advised of proposed changes, particularly of general increases or changes having a significant impact on existing rate levels, and furnishes the Commission any information it may need in reaching decisions.

7.

In reaching its final decision regarding proposed changes, the Commission, either with or without protest, may permit the tariff schedules to become effective as proposed, suspend the operation of the tariff schedules and institute an investigation or allow the tariff schedules to become effective on the proposed date and institute an investigation. When formal investigations are instituted, regarding either proposed changes or the justness and reasonableness of existing tariff schedules, public hearings are held and all interested parties are given an opportunity to be heard. After hearing and consideration of proposed or existing tariff provisions, the Commission may, in the public interest, permit proposed changes to become effective or continue in effect, deny proposed changes or increases and order them cancelled, allow lesser increases or require modification of proposed or existing rates, charges or rules and regulations, or take other action it deems proper. In any event, the Commission, not the carriers, makes the final decision as to what rates shall become effective and thereby established.

8.

I have found from my study of the Commission's records and files that it has recognized the value of collective

rate-making and the uniformity through agency tariff publications, especially uniformity in the classification of articles and rules associated with rates and charges, since 1940. In fact, it has on occasions required motor carriers to either participate in certain agency tariffs or adopt the provisions of those tariffs which were the result of collective rate-making. I have also found that the Commission has always recognized the right of the carriers to take independent action in the establishment, with Commission approval, of rates and charges and rules and regulations which shall apply for their individual account.

9.

Experience has proven to me that it is very helpful to the carriers and the public, but essential to the Commission, for motor carriers to be able to collectively make rates which they propose to be made effective on Alabama intrastate traffic. Under this system, it greatly reduces not only the number of tariffs required to be filed with the Commission but the expenses involved in such things as tariff publication, maintaining tariff files, rate negotiations between shippers and carriers and, above all, the Commission's in its regulatory activities. As indicated above, the Commission, with the aid of its staff, is able to review and study the tariff filings of the motor carriers because the preponderance of intrastate traffic moves under rates published in agency tariffs; however, if these carriers are ordered to cease collectively making rates and having them published in agency tariffs, and each of them required to publish and file their individual tariffs it would not be humanly possible for the Commission and its staff to continue its present practice. I seriously doubt that the State Legislature would or could appropriate sufficient funds for the staff that would be required to perform the required work and time would not permit the Commission to conduct as many hearings

as would be required to determine the justness and reasonableness of the carrier's proposed rates and charges.

10.

In my considered judgment, if the motor carriers can no longer collectively make rates and publish them in agency tariffs, not only would the regulatory scheme in Alabama be disrupted and thwarted but the general public would be done a great injustice. Any added expenses of the Commission would be reflected in higher taxes or carrier inspection fees, any additional expenses imposed on the carriers in would be reflected in higher rates and charges, and increases in transportation expenses will be reflected in higher costs being paid by the ultimate consumer. Many of the smaller carriers cannot afford the expense associated with the publication of individual tariffs. By the same token, there are many small shippers who cannot afford the expense that would be involved in having to negotiate with all the carriers who would be involved in moving their traffic as well as maintaining tariffs of these carriers. As it is now, under the procedures of the rate bureaus, both small carriers and shippers can provide input in rate negotiations at a minimum cost; also, with the use of only one or a few tariffs, shippers can determine their transportation cost as well as their competitors.

11.

It is my personal opinion that too much emphasis has been placed upon rates when considering competition among motor carriers. Through the years I have found that it is not necessarily the carrier or carriers who publish the lowest rates that determine which carriers will participate in the movement of the traffic. Transportation charges are admittedly a key factor but the overall trans-

portation service actually determines how most traffic is routed. Shippers will pay a premium in the actual transportation cost if that is required to assure them that the carriers they use are able to consistently provide them with sufficient equipment and handle their goods and a minimum of damage; after all, it is the prompt and safe delivery of goods at a reasonable cost that determines their profits and enables them to meet their competition. The use of carriers who may publish rates a few cents less than others but cannot provide these services do not control the traffic.

12.

I am thoroughly convinced that the present method of establishing transportation rates and charges, including collective rate-making, is necessary to protect the interest of the public and carriers alike. In fact, I feel it is essential under our regulatory scheme if we are to continue to have a healthy and viable transportation system adequate to meet the needs of the state's shipping public.

Robert A. Jones
ROBERT A. JONES

[Jurat Omitted in Printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 76-1909A

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.;
MOTOR CARRIERS TRAFFIC ASSOCIATION, INC.;
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.,
DEFENDANTS

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS, INTERVENORS

[Filed Sept. 13, 1979]

FINAL JUDGMENT

Plaintiff, United States of America, and Defendants, Southern Motor Carriers Rate Conference, Inc., ("SMCRC"), Motor Carriers Traffic Association, Inc., ("MCTA"), North Carolina Motor Carriers Association, Inc., ("NCMCA"), all having filed their respective Motions for Summary Judgment on August 1, 1978, and this court on March 20, 1979 having granted Plaintiff's Motion for Summary Judgment and denying all defendants' motions, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

1.

This court has jurisdiction over the subject matter and the parties here involved. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Sherman Act. (15 U.S.C. § 1).

2.

As used in this Final Judgment:

(a) "Tariff" means a publication containing one or more rates, charges, exceptions to the National Motor Freight Classification or alternative publication, rules, regulations, or other provisions or any combination thereof, of one or more common carriers together with supplements or looseleaf page amendments thereto, if any.

(b) "Rates" means a charge, payment or price fixed according to a ratio, scale or standard for direct or indirect transportation service.

(c) "Carrier" means a common carrier of property by motor vehicle.

(d) "General Commodities" means all items of property described in the Southern Motor Carriers Rate Conference, Inc., Alabama Intrastate Tariff 306; Georgia Intrastate Tariff 301 series; North Carolina Intrastate Tariff 304; and Tennessee Intrastate Tariff 305; and all respective supplements thereto and reissuances thereof; the Motor Carriers Traffic Association, Inc., North Carolina Intrastate Tariff 3-H and all respective supplements thereto and reissuances thereof; the North Carolina Motor Carriers Association, Inc., North Carolina Intrastate Tariff 10-H and all respective supplements thereto and reissuances thereof.

(e) "Intrastate for-hire transportation" means the pickup or receipt, transportation and delivery of property for compensation by a motor carrier authorized by a state regulatory agency to engage therein and to serve the general public on a common carrier basis.

(f) "Collective Rates" means any rate or charge, other than a "joint rate," established under any contract, agreement, understanding, plan, program, combination, or conspiracy between two or more competing carriers.

(g) "Joint Rate" means any rate established by two or more carriers, covering an interline movement of property over the routes of the carriers directly participating in the interline movement.

(h) "Intrastate Rate Committee" means any group of carriers' agents, employees or other representatives which formally or informally meet with defendants' employees to discuss or vote upon a change or changes in rates, fares, classifications, rules or regulations published in the intrastate tariffs issued by defendants.

(i) "Docket" means an informational bulletin published by a "tariff publishing agent" to inform and facilitate discussion between competing carriers with respect to the filing of rates for the intrastate for-hire transportation of property.

(j) "Tariff Publishing Agent" means a person duly authorized by a carrier, via a power of attorney on file with a state regulatory commission, to publish and file rates and provisions for that carrier's account in tariffs published in the name of the agent.

(k) "Tariff Watching Service" is a service provided by a tariff publishing agent whereby the agent notifies carriers subscribing to its service of competing carrier and rate bureau changes in their existing

tariffs and rates which have been filed with a state regulatory commission.

(l) "Intrastate rate" means any rate charged by a carrier for the intrastate for-hire transportation of property solely within a state and subject to regulation by that state.

(m) "Person" means any natural person, firm, partnership, association, corporation, or any other business or legal entity.

3.

The provisions of this Final Judgment are applicable to the defendants herein and shall also apply to each of the defendants' officers, directors, agents, employees, subsidiaries, successors, and assigns and to all other persons in active concert or participation with them who shall have received actual notice of this Final Judgment by personal service or otherwise; provided however, that nothing in this Final Judgment shall be read or construed to restrain or prohibit any state body, official or employee from acting in accordance with or pursuant to valid statutory authority.

4.

Defendants SMCRC, MCTA, and NCMCA are hereby enjoined and restrained from:

(a) Entering into, adhering to, maintaining, or claiming any rights under, directly or indirectly, any contract, agreement, understanding, plan, program, combination or conspiracy to fix, stabilize or maintain collective rates charged by competing carriers for the intrastate for-hire transportation of property;

(b) Maintaining any intrastate rate committee to consider, pass upon or discuss intrastate rates or rate proposals;

(c) Inviting, coordinating or providing a forum, including publication of a docket, for any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property;

(d) Providing information to any carrier about rate changes ordered by any other carrier employing the publishing services of any defendant prior to the time at which such rate change becomes a matter of public record;

(e) Knowingly publishing or causing to be published any docket, tariff or tariff supplement which was the result of any discussion or agreement between competing carriers with respect to collective rates for the intrastate for-hire transportation of property; or

(f) Communicating directly or indirectly any information concerning intrastate rates for competing motor carriers where the purpose or reasonably foreseeable effect of such communication is to maintain or renew, directly or indirectly, any contract, agreement, plan, program, combination or conspiracy to fix, stabilize or maintain rates charged by competing carriers for the intrastate for-hire transportation of property;

(g) Provided however, that nothing in this Final Judgment shall prevent any defendant from engaging in any activity which is judicially or statutorily exempted from the operation of the federal antitrust laws.

5.

Defendants are ordered and directed within six (6) months following the date of the entry of this Final Judgment:

(a) To cancel all tariffs (and any effective supplements thereto) on file with the state regulatory agen-

cies of Alabama, Georgia, Mississippi, North Carolina and Tennessee establishing rates and services for the intrastate transportation of general commodities and to take such action with the said regulatory commissions as may be necessary to effectuate cancellation and withdrawal of said tariffs.

(b) To terminate all previously executed powers of attorney and rate and tariff service agreements between a defendant and any carrier utilizing the services of that defendant authorizing the publication and/or filing of intrastate collective rates within the States of Alabama, Georgia, Mississippi, North Carolina and/or Tennessee.

(c) To cancel those provisions of their respective articles of incorporation, by-laws and procedures and every other rule, opinion, resolution, contract or statement of policy which have the purpose or effect of permitting, announcing, stating, explaining or agreeing to any business practice enjoined by the terms of this Final Judgment.

6.

(a) For those carriers who were or are members of defendants or have participated in defendants' collective tariffs, and who wish to continue to use their services as tariff publishing agents, defendants must offer an "open season" for a period of six months from the date of the entry of this Final Judgment to facilitate the filing of rates independently arrived at by each such carrier. During the "open season," defendants must obtain from each carrier using defendants' services as tariff publishing agents an affidavit which affirms that the new rates filed on behalf of that carrier were arrived at unilaterally by the independent action of that carrier during the "open season" and were not collectively established.

(b) Defendants must not take any steps or adopt any procedures which would have the effect of influencing any carrier from acting independently in establishing its rates in compliance with subsection (a) of this Article 6.

(c) Each defendant may initiate a tariff watching service, but no agreement between any defendant and a carrier for said watching service may include a provision for instituting automatic changes to rates on file for said carrier.

(d) Each defendant may issue one or more tariffs in which the independent rates of competing carriers are published.

(e) Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise in the compiling and publishing of tariffs, including rate justifications for that carrier's independent rate proposal filed with a state agency.

(f) Each defendant may charge carriers for expenses incurred on their behalf.

7.

Defendants are further ordered and directed:

(a) To take reasonable steps for dissemination of, education as to, and compliance with this Final Judgment involving their respective officers, directors, employees and agents having any responsibility in connection with analyzing or publishing tariffs published by defendants, advising such persons of their obligation under this Final Judgment. At a minimum defendants must provide each such officer, director, employee and agent within thirty (30) days of the entry of this Final Judgment with a copy of this Final Judgment, a statement of that defendant's compliance

policy under the Final Judgment in the form of an appropriate company manual or memorandum and shall obtain a written statement from each such officer, director, agent, or employee evidencing the receipt and understanding of these documents, such statements to be retained in the files of the defendants.

(b) For a period of five (5) years from the entry of this Final Judgment, each defendant must provide each new officer, director, agent and employee with a copy of this Final Judgment and a statement of the defendant's compliance policy hereunder in the form of an appropriate company manual or memorandum and must provide any carrier desiring to utilize defendant's services as a Tariff Publishing Agent with a copy of this Final Judgment. Each defendant must obtain a written statement from each officer, director, employee, agent, and carrier evidencing receipt and understanding of the applicable documents, such statement to be retained in the files of the defendant.

(c) Within one hundred and eighty (180) days after the date of the entry of this Final Judgment, each defendant shall file an Affidavit of Compliance with the court, and serve a copy thereof to plaintiff, reciting the steps taken to comply with this Final Judgment.

8.

For the purpose of determining or securing compliance with this Final Judgment, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division or his agent, subject to any legally recognized privilege:

(a) On reasonable notice to any defendant made to its principal office duly authorized representatives of the Department of Justice shall be permitted:

(1) Access, during office hours of said defendant, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the defendant relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of said defendants and without restraint or interference from it, to interview officers, directors, employees or agents of the defendants, any of whom may have counsel present, regarding any matters contained in this Final Judgment.

(b) The defendants shall submit such reports in writing, under oath if requested, with respect to matters contained in this Final Judgment as may from time to time be so requested.

No information or documents obtained by the means permitted in this Section 8 shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the executive branch of the plaintiff, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as required by law.

If at any time information or documents are furnished by a defendant to plaintiff, the defendant represents and identifies in writing the material in any such information or documents of a type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days notice shall be given by plaintiff to said defendant prior to divulging such

material in any legal proceeding (other than a Grand Jury proceeding) to which that defendant is not a party.

9.

Jurisdiction is retained by the court for the purpose of enabling any of the parties to this Final Judgment to apply to this court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

10.

This Final Judgment shall remain in effect for a period of five (5) years from the date upon which it is entered by the court.

IT IS SO ORDERED.

This, the 11th day of September 1979.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS
CLERK

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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Dated: July 26, 1984

PETITION FOR CERTIORARI FILED MAY 27, 1983
CERTIORARI GRANTED JUNE 11, 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a State which contemplates and expressly authorizes intrastate motor common carriers to submit collective rate proposals as a component of a pervasive and actively supervised system of regulation in the public interest must literally compel such collective activity in order to preserve its chosen regulatory system from proscription under Federal antitrust law?

2. Whether the *Noerr-Pennington* doctrine protects the interest of State regulatory commissions in receiving information in the form of rate proposals submitted by a group of regulated motor carriers?

PARTIES

The caption of this Petition contains the name of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the District Court. Neither Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., nor the National Association of Regulatory Utility Commissioners has any parent, subsidiary or affiliated companies.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1922

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

OPINIONS BELOW

Each of the opinions below is attached to the Petition for Certiorari:

The opinion of the United States District Court for the Northern District of Georgia, attached as Appendix A, is reported at 467 F.Supp. 471 (N.D. Ga. 1979). The opinion of the Fifth Circuit, Unit "B", attached as Exhibit B, is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). An order granting rehearing *en banc* is attached as Appendix

C. The opinion of the Fifth Circuit, Unit "B", on rehearing, attached as Appendix D, is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983).

JURISDICTION

The judgment of the Fifth Circuit, Unit "B", was entered on April 5, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was granted by order on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B", was entered on April 11, 1983. On April 21, 1983, Petitioners moved the Fifth Circuit, Unit "B", for a stay pending the filing of this petition for writ of certiorari. By order dated May 6, 1983, attached as Appendix E to the Petition for Certiorari, that Court granted the motion and stayed its mandate up to and including May 30, 1983. Certiorari was granted on June 11, 1984. 52 U.S.L.W. 3891 (June 12, 1984). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1) (1966).

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. sec. 1 (Supp. 1981), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The following State statutes and regulations are set forth in Appendix A attached to the brief of Petitioner Southern Motor Carriers Rate Conference, Inc.: section 62-152.1(b), North Carolina General Statutes; section 46-7-18, Official Code of Georgia Annotated; Rule 1-3-1-.14, Georgia Public Service Commission; sections

65-15-106(a) and 65-15-119, Tennessee Code Annotated; section 37-3-7, Code of Alabama; and section 77-7-3, Mississippi Code Annotated.

STATEMENT OF THE CASE

Petitioner National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental non-profit organization founded in 1889. Within its membership are the governmental agencies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. Each of the regulatory commissions in the five States in which this case has arisen, Alabama, Georgia, Mississippi, North Carolina, and Tennessee, is a member of the NARUC. On May 10, 1978, the District Court granted the NARUC's motion to intervene in this litigation as a defendant in order to represent the interests of these five-member commissions. (J.A. 43)

To avoid burdening the Court by the inclusion of repetitive material herein, the NARUC hereby adopts the Statement of the Case contained in the Brief of Petitioner Southern Motor Carriers Rate Conference, Inc. (SMCRC). See SMCRC Br. at 3-9.

SUMMARY OF ARGUMENT

The crucial issue in this case is whether or not the five States involved in this litigation may continue to employ a system of intrastate motor carrier regulation in which their respective regulatory commissions are free to accept both individual and collectively formulated rate proposals from the carriers they regulate. The Court of Appeals and Respondent United States (Government) have concluded that

federal antitrust law denies these States such a regulatory system; rather, in the view of the Court of Appeals and the Government, the States must accept only individual proposals or only collective proposals, but not both.

In response, Petitioner NARUC submits that conscious State legislative and regulatory decisions to employ a regulatory system combining individual and collective rate actions in furtherance of a clearly articulated and affirmatively expressed State policy to replace competition with regulation is protected by the State action exemption announced by this Court in *Parker v. Brown,* 3178 U.S. 341 (1943) (*Parker*). Based upon clear and essential principles of "our Federalism," *Parker* and its progeny serve to protect State economic regulatory programs which are both clearly articulated and affirmatively expressed as State policy and actively supervised by the State. *California Retail Liquor Dealers v. Midcal Aluminum,* 445 U.S. 97,105 (1980) ("the *Midcal* standard"). And further, there can be no doubt in this case that despite the nominal status of the antitrust defendants, it is these State regulatory programs which are under attack by the Government. In a very real sense, the five States and their regulatory commissions are the parties in interest herein.

This attack upon the State interests must ultimately fail, however, for the regulatory program in each of these States satisfies the *Midcal* standard. By its participation in this litigation, each State has described a pervasive system of economic regulation based upon active supervision of the ratemaking activities of regulated intrastate carriers pursuant to a clearly articulated and affirmatively expressed policy to replace unfettered competition with regulation in the public interest. Therefore, the affirmatively expressed decision of each of these States to protect the public in-

terest by relying on a system of individual and collective rate action is protected from Federal interference under the guise of the Sherman Act.

ARGUMENT

I. FUNDAMENTAL PRINCIPLES OF FEDERALISM UPON WHICH THE STATE ACTION DOCTRINE IS GROUNDED PROTECT AFFIRMATIVE STATE DECISIONS TO RECEIVE COLLECTIVE MOTOR CARRIER RATE PROPOSALS AS A COMPONENT OF A PERVASIVE, ACTIVELY SUPERVISED REGULATORY SYSTEM.

A. The State Action Doctrine Embodies Important Principles of Federalism Which Protect State Decisionmaking.

There can be no doubt that the State action exemption from the operation of Federal antitrust laws first announced by the Court in *Parker v. Brown*, 317 U.S. 341 (1943) is based squarely and firmly upon fundamental principles of American federalism:

> In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress.
>
> *Parker*, 317 US. at 351.

In its subsequent State action decisions, the Court has unswervingly affirmed the principle that the reach of the antitrust laws into areas of the economy subject to State regulation is limited by the *Parker* principles of federalism. Indeed, in its most recent term, the Court again recited the now familiar language of *Parker* quoted

supra. Hoover v. Ronwin, 52 U.S.L.W. 4535, 4538 (May 15, 1984). See also *Community Communications v. City of Boulder,* 455 U.S. 40 (1982) ("the *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under Constitution." at 53).[1] The "significant measure of sovereignty" described in *City of Boulder* means that under our constitutional system of government, the States have broad latitude to make choices in the mechanisms adopted to protect their citizens from economic exploitation.[2] *Midcal* teaches that so long as the State has clearly articulated and affirmatively expressed its regulatory choice through an actively supervised system of public regulation, this choice will be respected, and not enjoined by operation of antitrust law.

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[1]In this brief, the NARUC will not repeat the exegesis of the *Parker* line of cases contained in the brief of Petitioner SMCRC. SMCRC Br. at 11. However, the NARUC agrees with the conclusion that State compulsion is not a *sine qua non* for the availability of the State action defense in this case. Rather, the standard to be applied is the two-part formulation announced in *California Liquor Dealers v. Midcal Aluminum,* 445 U.S. 97 1980: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as State policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105. Importantly for purposes of the case at bar, the Court in *Midcal* found that the anticompetitive conduct therein under consideration (which the Court has since characterized as a "*private* price fixing arrangement *authorized* by [the] State", *Hoover v. Ronwin,* 52 U.S.L.W. 4535, 4538 (May 15, 1984) (emphasis added) satisfied the first prong of the test. Clearly, then, the presence of literal compulsion is not necessary to satisfy the first *Midcal* standard, irrespective of the identity of the parties involved.

[2]The problem in *City of Boulder,* of course, was that the State of Colorado had made no choice at all concerning local regulation of cable television. *City of Boulder,* 455 U.S. at 55 ("the State's position is one of mere *neutrality*") (emphasis in original).

B. The States As Real Parties in Interest.

Almost as a matter of definition, the State action issue, based as it is on principles of federalism, invariably arises in a situation in which the machinery of State or local government is enmeshed with the economic behavior of private parties — that is, a system of public regulation established to protect the public interest.[3] Viewed as such, both governmental and private party interests are involved when a federal antitrust attack is leveled at the whole of the regulatory mechanism or one of its parts. Therefore, in a very real sense, it is incorrect to focus on the identity of the parties in analyzing the applicability of the State action doctrine. Except perhaps in the extreme case in which the actions of a private party are completely removed from any colorable State involvement, it is the rare *Parker* type case in which significant State interests are not implicated. Indeed, as Judge Hill noted in his dissent to the *en banc* decision of the Court of Appeals, where a State has affirmatively established a system of regulation displacing unfettered competition, it makes little difference to the efficacy of State regulatory policy whether the antitrust plaintiff sues "governmental entities or private participants" in the regulatory scheme. App. to Pet. for Cert. at 83a-84a.[4]

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[3]E.g. *Parker, supra* (State regulation of agricultural production); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Hoover, supra* (State regulation of the practice of law); *City of Lafayette v. Lousiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison*, 428 U.S. 579 (1976) (State electric utility regulation); *New Motor Vehicle Board v. Orrin W. Fox*, 439 U.S. 96 (1978); *Boulder, supra* (municipal regulation of cable television franchises); and *Midcal, supra*, (State regulation of wine marketing).

[4]Citing Justice Stewart's dissent in *Cantor, supra*, 428 U.S. at 616-17, n. 4

So it is here. The interests of the five States involved in this litigation are implicated as surely and directly as if the Government had hailed their respective public service commissions into Federal court to defend their regulatory systems against injunction under the Sherman Act.[5] This strong State interest is apparent because the policies of these States are by no means "neutral" concerning the issue of intrastate collective rate action. Rather, there can be little doubt that each State whose regulatory procedures are under attack has made a conscious and informed decision to accept individual *and* collective rate proposals as a necessary element of its pervasive system of intrastate motor carrier regulation.[6]

A brief analysis of the North Carolina system of regulation makes apparent the strong State interest in this case, as well as the affirmative expression of State policy to include collective rate action in its regulatory scheme.[7] As distilled in the *amicus* brief of the State of North Carolina filed in the case, the policy of the State in the area of motor carrier regulation is to "establish motor carrier rates for the shipping public that are just and reasonable and

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[5]The District Court recognized the importance of this case to the respective States when it granted the NARUC's motion to intervene as a defendant in this case over the repeated objections of the Government. (J.A. 43) "Whether these five commissions will be able to continue in their present ratemaking routines is an essential question posed in this litigation." (J.A. 46)

[6]See SMCRC Br. at 24-30. for a State by State description of the regulatory policies and procedures of the five States concerning collective rate action. We adopt the conclusion that each State program satisfies the *Midcal* standard.

[7]By focusing its attention on North Carolina, the NARUC joins the District Court, which found that "[p]rocedures within each commission for review of published rates tend to be uniform." App. to Pet. for Cert. 9a.

nonpreferential and nondiscriminatory."[8] To fulfill this policy, it is the State itself, acting through the North Carolina Utilities Commission (NCUC) which fixes and establishes rates for motor carrier transportation services.[9] Based upon years of experience with its regulatory program, North Carolina has concluded that in order to efficiently regulate the 600 individual carriers operating within its borders, collective rate action as authorized by State legislation is an essential part of its regulatory system: ". . . the NCUC regards the collective activity of the rate bureaus as necessary to the efficient regulation of intrastate carrier rates."[10] Clearly, then, North Carolina quite ably demonstrates a regulatory policy committed to the use of collective rate proposals as an element of a comprehensive program displacing market competition with public regulation.[11]

There can be little doubt, then, that North Carolina's interest in the issue raised in this litigation (whether the State must compel collective rate proposals) is strong. The State's *amicus* brief is in large measure a plea for the regulatory flexibility which would be lost if the Government's theory of the State action doctrine prevails.[12]

[8]North Carolina Am. Br. at 5.

[9]*Id.*

[10]*Id.* at 11.

[11]See also Affidavit of J.C. Turner, (J.A. 50, 54) (". . . collective rate-proposing in North Carolina greatly assists the Public Staff in fulfilling its duty and responsibility to adequately protect the using and consuming public. . ."); and Affidavit of I.H. Hinton, (J.A. 55).

[12]The "compulsion test" advocated by the Government and upheld by the Court of Appeals would, of course, bind the five States in a regulatory straitjacket which would serve to stifle rather than promote, competition. App. to Pet. for Cert. at 79a. Therefore, by destroying the flexibility that North Carolina and its sister States have determined is necessary to effective public regulation, the Government's position destroys both competition and the sovereign ability to make regulatory policy.

North Carolina Am. Br. at 12. North Carolina's decision to accept both individual and collective rate proposals serves regulatory purposes which are important to the integrity and efficiency of the State's regulatory process. We submit that it is not the purpose of Federal antitrust law to prohibit such State decisionmaking; rather, the State action doctrine preserves North Carolina's sovereign ability to choose the system of regulation it determines will protect the public interest. Here, North Carolina has made its policy choice clear and its interest in preserving this decision must prevail.

In the final analysis, the NARUC submits that Federal antitrust laws are an illsuited instrument for the reformation of State regulatory policies, particularly where, as here, Federal power is employed to strike at the heart of a State's chosen regulatory policy. If and when a State determines that collective rate action is not in the public interest, ample legislative and regulatory mechanisms exist in State government to modify or even abolish this policy. Until such new decisions are made, however, existing State policies should be respected and not enjoined under the Sherman Act.

II. NOERR-PENNINGTON

Petitioner NARUC adopts the argument presented in the brief of SMCRC on this issue., SMCRC Br. at 38-42.

CONCLUSION

As the District Court found,

> Whether these five [State] commissions will be able to continue in their present rate-making routines is an essential question posed in this

> litigation. A negative answer to this question will necessarily impede or impair the commissions' interest in continued use of the present rate conferences. (J.A. 46)

It is the position of the NARUC that the very basis of the State action doctrine – the need to protect clearly articulated and affirmatively expressed State policies from antitrust interference – requires that this question be answered in the affirmative, particularly where, as here, the antitrust attack strikes at the core of the State's system of regulation. Therefore, the NARUC respectfully requests that the decision of the Court of Appeals be reversed.

Respectfully submitted,

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No. 82-1922

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

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CERTIORARI GRANTED JUNE 11, 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a State's clearly articulated and affirmatively expressed policy to displace competition with a pervasive, actively supervised regulatory scheme, shields from antitrust liability a private party acting in a manner contemplated and authorized, but not literally compelled, by the State?

2. Whether the collective formulation and submission to a State regulatory board of a rate proposal by a group of motor common carriers, acting pursuant to a pervasive scheme of State regulation, is protected activity under the *Noerr-Pennington* doctrine?

PARTIES

The caption of this Brief contains the names of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the district court. Neither Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., nor the National Association of Regulatory Utility Commissioners has any parent, subsidiary or affiliated companies. A list of member carriers of Southern Motor Carriers Rate Conference is contained in the panel brief of Southern Motor Carriers Rate Conference filed in the Fifth Circuit, Unit "B."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1922

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported at 467 F. Supp. 471 (N.D. Ga. 1979). Appendix to Petition for Certiorari ("Pet. App.") A at 1a-30a. The opinion of the Fifth Circuit, Unit "B" is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). Pet. App. B at 31a-60a. The Fifth Circuit, Unit "B" entered an order granting rehearing *en banc*. Pet. App. C at 61a-62a. The opinion of the Fifth Circuit, Unit

"B" on rehearing is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983). Pet. App. D at 63a-93a.

JURISDICTION

The judgment of the Fifth Circuit, Unit "B" was entered on April 5, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was granted by order on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B" was entered on April 11, 1983. On April 21, 1983, Petitioners moved the Fifth Circuit, Unit "B" for a stay pending the filing of a petition for writ of certiorari. By order dated May 6, 1983, Pet. App. E at 94a-95a, that court granted the motion and stayed its mandate through May 30, 1983. The petition for certiorari was filed on May 27, 1983 and certiorari was granted on June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C.A, § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The following statutes and regulations are set forth in Appendix A hereto: 28 U.S.C.A. § 10521(b); Section 62-130(a) and 62-152.1(b) and (h), North Carolina General Statutes; Section 46-7-18, Official Code of Georgia Annotated; Rule 1-3-1-.14, Georgia Public Service Commission; Sections 65-15-106(a) and 65-15-119, Tennessee Code Annotated; Rule 1220-2-1-.40, Tennessee Public Service Commission; Section 37-3-7, Code of Alabama; Section 37-3-19(g), Code of Alabama; Section 77-7-3, Mississippi Code Annotated; Section 77-7-221, Mississippi

Code Annotated; and Rule 39d(4), Mississippi Public Service Commission.

STATEMENT OF THE CASE

Petitioner Southern Motor Carriers Rate Conference, Inc. ("SMCRC") is an association of motor common carriers whose members provide interstate and intrastate transportation services. The interstate aspects of these services are regulated by the Interstate Commerce Commission; the intrastate aspects are subject to regulation by the States. Stipulation No. 3, Record ("R.") 1267-68. *See* 49 U.S.C.A. § 10521(b). SMCRC assists its members in proposing rates to the governing state regulatory agencies of Georgia, Mississippi, North Carolina and Tennessee,[1] and publishes interstate and intrastate tariffs containing rates for the transportation of general commodities between points in the southeastern United States, including the States of Georgia, Mississippi, North Carolina and Tennessee. Pet. App. at 2a.[2] Petitioner North Carolina Motor Carriers Association ("NCMCA") performs these functions on the intrastate level for its members in North Carolina. Petitioners SMCRC and NCMCA also represent their member carriers in rate hearings conducted by the state public service commissions having authority to regulate intrastate

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[1] See Affidavits, Exhibits "B", "C", "D" and "E" to SMCRC's Motion for Summary Judgment (R. 1341, 1372-88); Pet. App. at 1a-2a.

[2] SMCRC no longer publishes intrastate tariffs for carriers in Alabama and is not presently active before the Alabama Public Service Commission. Although the issue of Alabama's regulatory system accordingly may be moot as to SMCRC, it may not be moot as to Petitioner National Association of Regulatory Utility Commissioners, which was allowed to intervene by the District Court to represent the interests of the state regulatory bodies including, *inter alia*, the Alabama Public Service Commission. JA-44, 46.

motor carriers. *Id.* Petitioner National Association of Regulatory Utility Commissioners ("NARUC") is the national association for state regulatory commissioners, members of which regulate intrastate motor common carriers.

In 1976, Respondent United States filed a complaint alleging that SMCRC, NCMCA and Motor Carriers Traffic Association, Inc. ("MCTA") had been engaged since the early 1940's in a continuing conspiracy to fix intrastate general-commodity transportation rates within the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee. Complaint ¶¶ 24-25, Joint Appendix ("JA")9-10.

At the district court's invitation *sua sponte*, R. 434-35, the attorneys general of these five States filed briefs as *amici curiae*, and NARUC was allowed to intervene as a defendant to represent the public service commissions of these five States. R. 466, 1260. While neither the States nor the state commissioners were named as defendants by the Government, the district court recognized that "[w]hether these five commissions will be able to continue in their present ratemaking routines is an essential question posed in this litigation." JA-46.

Intrastate motor transport is pervasively regulated in these States by state public service or public utility commissions acting under broad regulatory authority granted by state statutes. Pet. App. at 3a-7a. Indeed, these statutes place the power to prescribe motor common carrier rates in the state commissions.[3]

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[3] *Georgia*: *See* Official Code of Georgia Ann. § 46-7-18 (1984 Cum. Supp.), App. A at 4a, R. 437-38. and Pet. App. at 4a; *North Carolina*: *See* N.C. Gen. Stat. § 62-130(a) (1983 Supp.), App. A at 1a, Pet. App at 6a-7a, and R. 1088; *Tennessee*: *See* Tenn. Code Ann. § 65-15-106(a)

As noted by the district court, "[t]he states, as amici, have stressed the integral role of the conferences, and it is clear that, at the least, they are a part of daily regulatory life." Pet. App. at 9a. In general, see R. 1369-88, SMCRC maintains intrastate rate committees which meet to consider proposals by carriers submitted for publication as supplements to existing intrastate tariffs. After notice and opportunity to the public (including shippers) to express opinions, the committees either adopt the proposal as is, adopt it after making modifications, or reject it. Adopted proposals are published with various delayed effective dates and submitted to the respective state agencies for further action. The district court found that "[t]he commissions consistently require hearings, . . . and an order scheduling a hearing automatically suspends a proposed tariff." Pet. App. at 9a.

In light of these regulatory systems, representatives of the state commissions explicitly stated in the district court that collective rate proposals by regulated carriers are integral and necessary to their regulatory duties, and as such have been actively encouraged for decades.[4]

Intrastate motor carriers are not compelled to make collective rate proposals; instead, they may file proposals individually, which is called "independent action." Pet. App. at 93a. This is done for specific commodities and is

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(1983 Supp.), App. A at 8a, Pet. App. at 7a, R. 438; *Mississippi*: *See* Miss. Code Ann. § 77-7-221 (1972), App. A at 15a; *Alabama*: *See* Code of Alabama 1975 § 37-3-19(g)(1977), App. A at 14a.

[4] *See* Affidavit of Alabama Public Service Commissioners at ¶ 8 (R. 621, 622); Brief *Amicus Curiae* of State of Georgia (R. 684, 694); Response of State of Mississippi (R. 1056, 1065-66); Affidavit of I. H. Hinton, Director, Transportation Division, North Carolina Utilities Commission at ¶ 11 (JA-55, 60-61); Response of Tennessee Public Service Commission as *Amicus Curiae* (R. 901, 910-12).

an exception to the overall class rate structure within each state.[5]

Beyond the encouragement of the state commissions statutorily empowered to regulate, the activities of the rate conferences at issue herein have been contemplated and authorized by the legislatures of the affected States. North Carolina has by statute, N.C.Gen.Stat. § 62-152.1(b), App. A at 2a, authorized collective rate proposals by motor carriers and has immunized such conduct from state antitrust laws. Georgia has required its Public Service Commission to establish a collective ratemaking procedure for motor carriers and has required carriers to comply with such procedures. Official Code of Georgia Ann. § 46-7-18 (Cum. Supp. 1984), App. A at 4a. Georgia Public Service Commission Rule 1-3-1-.14, App. A at 6a, implements this statute with specific procedures. Tennessee, which previously authorized collective rate formulation by motor carriers pursuant to Rule 1220-2-1.40, Tennessee Public Service Commission, App. A at 11a, now also has enacted similar legislation. Tennessee Code Ann. § 65-15-119 (Supp. 1983), App. A at 9a. Mississippi and Alabama have enacted legislative systems pervasively regulating motor common carriers. The Mississippi and Alabama Public Service Commissions' administrative practices encourage and depend on rate bureau activities. *See* Affidavit of Alabama Public Service Comm'rs at ¶ 8, R. 621, 622; Response of State of Mississippi, R. 1056, 1065-66.

In the district court, Petitioners argued, *inter alia*, that their conduct did not violate the Sherman Act, since it was the state regulatory commissions which actually set the rates in response to proposals submitted by Petitioners. Petitioners also argued that their conduct was

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[5] *See* Affidavit of Andrew W. Rymer, at ¶ 11 (JA-79, 83).

immune from the federal antitrust laws by virtue of the state action doctrine and the *Noerr-Pennington* doctrine.

On cross-motions for summary judgment, the district court held that the state action doctrine did not apply because the involvement of the state regulatory commissions did not amount to state compulsion[6] and that *Noerr-Pennington* did not apply because the court believed it could "accord independent significance to the defendants' activities of rate formulation and proposal."[7] The court concluded that: "Even though the proposals require state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decision-maker."[8] Finally, the district court found that the conduct constituted price fixing in violation of the Sherman Act notwithstanding the requirement that the proposed rates be submitted to the state regulatory commissions for review and possible modification or rejection.[9] Accordingly, the district court granted the Government's motion for summary judgment. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979). Pet. App. at 1a-30a.

On appeal, a divided panel of the Fifth Circuit, Unit "B" affirmed. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir., Unit B, 1982). Pet. App. at 31a-60a. Judge Johnson, joined by Judge Scott of the Middle District of Florida, sitting by designation, agreed with the district court that compulsion is a

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[6] Pet. App. at 21a-22a. The court held that compulsion was established as a prerequisite to state action in Goldfarb v. Virginia State Bar Association, 421 U.S. 773 (1975). Pet. App. at 18a.

[7] Pet. App. at 26a.

[8] *Id.*

[9] Pet. App. at 28a.

prerequisite to application of the state action doctrine. The majority interpreted this Court's decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) as relying upon a *Goldfarb*-based compulsion requirement.[10] Judge Hill dissented, finding that *Midcal* established a two-pronged test for state action which is applicable to the conduct of private parties, such as that of Petitioner SMCRC.[11]

As to *Noerr-Pennington*, the panel majority agreed with the district court that the initial step of collectively formulating a rate proposal could be viewed separately from the act of presenting the proposal to the state regulatory commissions. So viewed, the majority held that *Noerr-Pennington* did not protect the collective formulation of rates despite Respondent's implicit concession that the presenting of the proposed rates is protected activity.[12] Finally, the majority concluded that the activity at issue constituted price fixing in violation of the Sherman Act.[13]

On rehearing *en banc*, a divided Court of Appeals for the Fifth Circuit, Unit "B" affirmed, 8-4. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. Unit "B" 1983). Pet. App. at 61a-93a. Judge Johnson, again writing for the majority, reiterated the view he expressed in the panel opinion that *Midcal* did not alter a *Goldfarb* compulsion requirement.[14] Judge Hill, again in dissent, expressly recognized the conflict between the holding of the majority and the "clear and

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[10] Pet. App. at 36a-39a.

[11] Pet. App. at 54a-55a (Hill, J., dissenting).

[12] Pet. App. at 43a-44a.

[13] Pet. App. at 46a-47a.

[14] Pet. App. at 73a-74a.

explicit" holding of this Court in *Midcal*.[15] Certiorari was granted by this Court on June 11, 1984. 52 U.S.L.W. 3885.

SUMMARY OF ARGUMENT

The state action doctrine first announced in *Parker* v. *Brown*, 317 U.S. 341 (1943) declares that the dictates of the Sherman Act do not proscribe anticompetitive activities of the States. The rationale of *Parker* is based on concepts of federalism inherent in our dual system of government. Beginning with *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) and continuing through *Hoover* v. *Ronwin*, 52 U.S.L.W. 4535 (U.S. April 15, 1984), this Court has refined the analysis utilized in cases involving the state action doctrine. As stated in *Hoover* last Term, it must first be determined whether the activity at issue is that of the State itself acting in a sovereign capacity. If so, the activity is, without more, beyond the reach of the antitrust laws. However, if the activity is that of a non-sovereign state representative, it must be determined whether such representative is acting pursuant to a clearly articulated and affirmatively expressed State policy and whether the State actively supervises the activities of its representative. *Id.* at 4538. See also *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

The Eleventh Circuit[16] incorrectly held that the two-part state action test announced in *Midcal* cannot be met

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[15] Pet. App. at 81a (Hill, J., dissenting).

[16] The panel and *en banc* decisions below were rendered by the Fifth Circuit, Unit "B," pursuant to Section 9(1) of Public Law 96-452 (October 14, 1980). In view of this Court's order granting certiorari to the Eleventh Circuit, all further references in this brief will so designate the court of appeals.

by private defendants unless the State literally compelled their activities. This holding failed to recognize the evolution of the state action doctrine through the later cases, including *Lafayette*, *Midcal* and *Hoover*.

The state statutes and regulations involved herein clearly articulate and affirmatively express state policies to displace competition in the area of motor common carrier rates. These statutes establish pervasive systems of regulation which contemplate and authorize collective rate formulation by motor common carriers. These rate proposals are submitted to state regulatory bodies which routinely suspend the filings and hold hearings to examine these proposals. Indeed, it is not disputed that the active supervision prong of the *Midcal* test is met in this case.

Each of the States involved herein, at the invitation of the district court, filed a brief *amicus curiae* and/or affidavits which indicated, *inter alia*, that the state public service commissions would have great difficulty fulfilling their regulatory mandates in the absence of collective rate formulation by the motor carriers. Thus, the activity of Petitioner SMCRC is a crucial and integral part of the state regulatory processes. Notwithstanding the absence of literal compulsion by the States to engage in collective rate formulation, the activities of the rate conferences are contemplated and authorized by the States and are subject to the active supervision of the States.

Finally, Petitioner SMCRC contends that its activities in formulating collective rate proposals and submitting those proposals to the state regulatory agencies constitute activities within the scope of the *Noerr-Pennington* doctrine and thus are exempt from the antitrust laws. *Noerr-Pennington* makes clear that collective activity comprised of petitioning the government is

shielded from the antitrust laws, even where the requested action would be anticompetitive. Moreover, the activity at issue herein serves the dual purposes of the *Noerr-Pennington* doctrine by providing the government with a valuable source of information through which the regulatory bodies discharge their responsibilities and allowing the private motor common carriers to petition their government with respect to activity that is of the utmost importance to them.

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ARGUMENT

I. The Evolution of the State Action Doctrine

A. Introduction—There Is a Binary Approach to Application of the State Action Doctrine

From the enunciation of the state action doctrine by Chief Justice Stone in *Parker* v. *Brown*, 317 U.S. 341 (1943), through this Court's most recent analysis of the doctrine in *Hoover* v. *Ronwin*, 52 U.S.L.W. 4535 (U.S. April 15, 1984), it has been unquestioned that the dictates of the Sherman Act do not proscribe anticompetitive activities of the several States. This is so because, in the now familiar words of Chief Justice Stone:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[17]

Since 1975, when this Court first revisited the state action doctrine in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the parameters of the doctrine have been evolving. As different courts applied their interpretations of the doctrine to different defendants engaged in various types of anticompetitive activities, it became nec-

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[17] 317 U.S. at 351.

essary for this Court to clarify state action. In so doing, the Court "has never departed, however, from *Parker's* basic reasoning."[18]

Thus it has been that the Court has applied *Parker* to evaluate situations involving the activities of state supreme courts,[19] municipalities,[20] a state administrative board[21] and private parties.[22] These cases, culminating with the decision in *Hoover* last Term, establish a binary approach to the application of the state action doctrine. First, if the activity is that of the state itself, *i.e.*, either the state legislature or state supreme court acting in a legislative capacity, the activity is, without more, beyond the reach of the antitrust laws.[23] Second, "[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization."[24]

It is this second class of activity which is at issue *sub judice*.[25] Congress has reserved to the States the ex-

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[18] *Hoover*, 52 U.S.L.W. at 4538.

[19] *Hoover*, 52 U.S.L.W. 4535; Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[20] Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

[21] New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).

[22] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); *Goldfarb*, 421 U.S. 773.

[23] *Hoover*, 52 U.S.L.W. at 4538.

[24] *Id.* (footnote omitted).

[25] It is apparent that the activity is a part of regulatory systems displacing pure competition. Because of the regulatory context, once the lower courts found an absence of antitrust immunity (under *Parker* and *Noerr-Pennington*), their analysis of anticompetitive

clusive authority to regulate intrastate motor common carriers, specifically including the regulation and setting of intrastate rates.[26] The state legislatures of Alabama, Georgia, Mississippi, North Carolina, and Tennessee, pursuant to this reserved authority, have directed state public service commissions to regulate the activity of motor common carriers operating in intrastate commerce.[27] To the end of an efficient regulatory process, these legislatures have clearly articulated an intent to displace competition and have contemplated collective activity among motor carriers, subject to pervasive regulation, in order to achieve their regulatory goals.[28] It is Petitioner SMCRC's contention that these statutes, combined with the active supervision of the state public service commissions, constitute the basis for a valid state action defense. An examination of this Court's state action decisions, therefore, is necessary to determine whether the proper test was applied by the Eleventh Circuit in rejecting Petitioner SMCRC's state action defense.

B. Parker and Its Progeny Establish a Two-Part Test Which Should Be Applied to Petitioner's Activities

As noted above, it was first recognized in *Parker* that Congress had not intended, by enacting the antitrust laws, to proscribe the activities of the States as sovereign authorities. This limitation was then and is now grounded in notions of federalism. In *Parker*, the State Agricultural Prorate Advisory Act authorized but did not compel

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effects should have been under the Rule of Reason because of the demonstration in the record of the necessity of these activities to state regulation of motor carriers. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23-24 (1979).

[26] 49 U.S.C. § 10521(b).

[27] See *supra* section II. A at p. 24.

[28] See *supra* section II. B at p. 30.

private raisin growers to jointly propose and petition the State Agricultural Prorate Advisory Commission to approve a marketing program for the raisin crop. The Court held that an approved program was immune from the antitrust laws, stating:

> It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the progam and which enforces it with penal sanctions, in the execution of a governmental policy.

317 U.S. at 352. *Parker* was the first and last word on state action immunity for more than thirty years.

In 1975, however, the Court handed down its decision in *Goldfarb*, which provides much of the grist for the dispute here. *Goldfarb* involved publication of a minimum fee schedule by the Fairfax County Bar Association. This fee schedule was condoned by the State Bar, which issued two ethical opinions to the effect that the schedules could not be habitually ignored by attorneys. 421 U.S. at 776-77. However, the Virginia Supreme Court had "explicitly directed lawyers not 'to be controlled' by fee schedules." *Id.* at 788-89. The Court held that there was no "state action" involved in the establishment of the minimum fee schedule:

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or re-

> quire the type of price floor which arose from respondents' activities.

421 U.S. at 790. The Court rejected an application of state action based on the contention that the Bar's activities complemented the state ethical code for attorneys, stating:

> It is not enough that as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 791. It is this language which is relied upon by the Eleventh Circuit *sub judice* as the basis for its holding that "compulsion is required of private parties. . . ." Pet. App. at 65a. In so holding, the Eleventh Circuit has failed to perceive that:

> Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to "state action" analysis under Parker.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring in part and in the judgment).[29]

A clear standard for state action did not emerge from *Goldfarb*. In the next state action case, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), five members of the Court agreed only that state action immunity did not apply to a private utility company which supplied its

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[29] The notion of an evolving state action doctrine also is suggested by Judge Hill in his dissent to the *en banc* decision below. See Pet. App. at 84a-88a. *See also* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 *Harv.L.Rev.* 435 (1981).

residential customers with free replacement light bulbs pursuant to tariffs approved by the Michigan Public Service Commission. The Justices agreed that mere approval of the tariff by the Public Service Commission did not convert the private action of the utility company into state action. 428 U.S. at 598. Four Justices were of the opinion that unless a public official or agency was named as a defendant or accused of violating the antitrust laws, the *Parker* rationale would not apply. 428 U.S. at 591-92.

Chief Justice Burger, who cast the fifth vote joining in the judgment of the Court, wrote separately to observe that:

> In interpreting Parker, the Court has heretofore focused on the challenged *activity*, not upon the identity of the *parties* to the suit.

428 U.S. at 604 (Burger, C.J., concurring in part and in the judgment).[30] The Chief Justice then pointed out that Michigan law was neutral on the question of a light bulb replacement program, which was not essential to the regulatory scheme, and that a state action exemption "on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy." *Id.* at 605.

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[30] An analysis which focuses on the party rather than the activity similarly was rejected in the dissent to *Cantor* written by Justice Stewart and joined in by Justices Powell and Rehnquist:

> If Parker v Brown, supra, could be circumvented by the simple expedient of suing the private party against whom the State's 'anticompetitive' command runs, then that holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

428 U.S. at 617 n.4. *See also* Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F.Supp. 711, 724 (D. D.C. 1979) *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); Pet. App. at 83a-84a (Hill, J., dissenting).

With the next opportunity to review the state action doctrine in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), the Court began to identify the binary nature of the doctrine—that is, entitlement to state action depends on whether the activity is (1) that of the State itself, acting as sovereign through its legislature or supreme court, or (2) that of a representative of the State. *Bates* involved a challenge by two attorneys to State Bar of Arizona rules prohibiting lawyer advertising. The attorneys claimed, *inter alia*, that the rules violated the Sherman Act because they tended to limit competition.

The Court held that, despite the absence of the Arizona Supreme Court as a defendant, the attorneys were in fact challenging an act of the State:

> The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. . . . Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361 (citation omitted).[31] Insofar as the private defendant State Bar was concerned, the Court noted that the disciplinary rules "reflect a clear articulation of the State's policy with regard to professional behavior." *Id.* at 362. "Moreover . . . the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Id.*

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[31] The majority opinion in *Bates* was written by Justice Blackmun and joined in by Justices Brennan, White, Marshall and Stevens. Chief Justice Burger, Justice Powell (joined by Justice Stewart) and Justice Rehnquist each wrote separate opinions in which, *inter alia*, they each concurred in the portion of the majority opinion relating to state action. Thus, at least as to state action, the *Bates* Court was unanimous.

Thus, although *Bates* is seen as a case in which the activity was that of the State itself acting legislatively through the Arizona Supreme Court,[32] the Court expressed the position that a clear and affirmative articulation of state policy, together with active state supervision, would insulate a state's representatives from antitrust liability. This position continued to develop in subsequent state action decisions involving various types of activities of non-sovereign state representatives, including *Lafayette* (a municipality), *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by a state administrative agency) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (a private price-fixing arrangement).

In *Lafayette*, private utility companies filed an antitrust counterclaim against the City of Lafayette, which had instituted an antitrust action against the companies. Justice Brennan, delivering the opinion of the Court, held that Congress did not intend to exclude cities from the reach of the Sherman Act. 435 U.S. at 408. In an opinion joined by Justices Marshall, Powell and Stevens, Justice Brennan went on to state that although municipalities are not the equivalent of States for state action purposes, municipalities which engage in anticompetitive conduct "pursuant to state policy to displace competition with regulation or monopoly public service" are within the scope of the *Parker* doctrine. *Id.* at 413.

The plurality expressed the opinion that, "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415.

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[32] *Hoover*, 52 U.S.L.W. at 4538.

Justice Brennan explained that this test would require municipalities to comply with the antitrust laws unless the State has "directed or authorized an anticompetitive practice." *Id.* at 416. Chief Justice Burger, concurring in the judgment, saw the plurality's test as a minimum showing to be required by municipalities seeking state action protection. *Id.* at 425 n.6. In dissent, Justice Stewart, joined by Justices White, Rehnquist and, in pertinent part, Blackmun, would have held that the activities of municipalities are "governmental action" which are *ipso facto* immune from the antitrust laws under *Parker*. 435 U.S. at 429.

In *New Motor Vehicle Board*, six members of the Court held that a program requiring a state administrative board to review and approve the relocation or establishment of new-car dealerships was immune from antitrust attack despite the fact that approval would be delayed automatically upon the non-compelled filing of a protest by a private competitor of the applicant. "[T]he Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *New Motor Vehicle Board*, 439 U.S. at 109.

In comparison to *New Motor Vehicle Board*, in which a state administrative agency acted in response to private initiative, *Midcal* presented activity amounting to "essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. In *Midcal*, a California statute required all wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the State. Sales of wine at prices other than those established in the fair trade contracts or wholesaler price schedules were prohibited. The State retained no responsibility or authority to

review the contracts or schedules filed in compliance with the statute.

After reviewing the state action decisions from *Parker* through *New Motor Vehicle Board*, a unanimous[33] Court held that:

> These decisions establish two standards for antitrust immunity under Parker v Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

445 U.S. at 105. Applying this test to the facts, the *Midcal* Court concluded the California statute constituted a clear state policy to displace competition, thus meeting the first prong of the test. *Id.* As to the active supervision requirement, the Court held:

> The program, however, does not meet the second requirement for Parker immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of the fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

Id. at 105-06. Nothing in the subsequent decision in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) disturbs the *Midcal* test. Indeed, the *Boulder* Court recognized that *Lafayette*, *New Motor Vehicle Board* and *Midcal* "reaffirmed both the vitality and intrinsic limits of the Parker state-action doctrine." 455 U.S. at 54. The *Boulder* Court observed:

> It was expressly recognized by the plurality opinion in City of Lafayette that municipalities "are not

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[33] Justice Brennan did not participate in the consideration or decision of *Midcal*.

> themselves sovereign," . . . and that accordingly they could partake of the Parker exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy . . . The Court adopted this view in [New Motor Vehicle Board v.] Orrin W. Fox Co. . . . and Midcal. . . .

Id. The Eleventh Circuit majority in the case *sub judice* was of the opinion that *Midcal* "had nothing to do with the applicability of a state action defense to a private party." Pet. App. at 74a. As support for this proposition, the Eleventh Circuit notes that immediately following the enunciation of the two-part test in *Midcal*, the Court cited *Lafayette*, a "non-private party case." Pet. App. at 75a. Additionally, the Eleventh Circuit claims support from the above-quoted statement in *Boulder*, 455 U.S. at 51 n.14, that *Midcal* "adopted the principle . . . that anticompetitive restraints *engaged in by state municipalities or subdivisions* must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption." Pet. App. at 75a (emphasis by the Eleventh Circuit). This reasoning ignores the fact that *New Motor Vehicle Board* adopted and applied the "clear articulation" test to a state administrative board while *Midcal* adopted and applied the test to a private price-fixing arrangement.[34]

Indeed, Petitioner SMCRC suggests that the citation to *Lafayette* following the announcement of the *Midcal* test, and the subsequent reference in *Boulder*, demonstrate that municipalities and private parties are intertwined for purposes of the initial analysis undertaken in state action cases. This approach is continued in *Boulder*,

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[34] 445 U.S. at 106. *See also Hoover* 52 U.S.L.W. at 4538; Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 824 n.9 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. at 724-725.

which applies the "clear articulation and affirmative expression" test to a municipality's home rule ordinance and concludes that a statute providing a general grant of legislative power is neutral as to anticompetitive activity. Therefore, the statute cannot be viewed as affirmatively expressing a state policy to displace the antitrust laws. 455 U.S. at 55-56.[35]

The state versus non-state binary structure for state action was reaffirmed just last Term in *Hoover*. There it was held that "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." 52 U.S.L.W. at 4538. Similarly, "a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature." *Id.* But:

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization. See, *e.g.*, *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) (municipal regulation of cable television industry); *California Liquor Dealers* v. *Midcal Aluminum*, 455 U.S. 97 (1980) (private price-fixing arrangement authorized by State); *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by state administrative board).

52 U.S.L.W. at 4538. The Eleventh Circuit's statment below that *Midcal* had nothing to do with private parties

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[35] It has been suggested that municipalities need not demonstrate active state supervision in order to qualify for state action immunity. Town of Hallie v. City of Eau Claire, 700 F.2d at 381-82. That the question has yet to be resolved by this Court was made clear in *Boulder*: "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in Midcal." 455 U.S. 51 n.14

was made prior to the decision in *Hoover*, in which this Court characterized *Midcal* once again as involving private anticompetitive activity. *Hoover*, 52 U.S.L.W. at 4538; *Midcal*, 445 U.S. at 106.

Therefore, *Hoover* teaches that municipalities, private parties and state administrative agencies are "nonsovereign state representatives" of which "the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation. . . . The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry." 52 U.S.L.W. at 4538.

The court of appeals held below that the absence of "compulsion" was fatal to the position of Petitioners, despite the presence of active supervision by the States, Pet. App. at 73a, and regardless of how clearly articulated the State policy may have been. Pet. App. at 64a-65a. That "compulsion" as utilized in *Goldfarb* and *Cantor*, and subsequently repeated occasionally in later decisions, did not mean literal compulsion as the *sine qua non* of state action,[36] and that it was not so interpreted by the courts, has been recognized by a leading commentator:

> In addition to requiring state supervision and intent to displace antitrust law, *Goldfarb* and *Cantor* emphasized that the state had not "compelled" the bar to fix prices or the utility to file a "free light bulb" tariff. Compulsion, however, should not be read as an independent requirement for state action immunity; rather, its presence or absence should serve only as strong evidence about state intent.

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[36] *Southern Motor Carriers*, Pet. App. at 54a-55a (Hill, J., dissenting).

Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 438 (1981).[37] The Eleventh Circuit majority failed to perceive the development and evolution of the state action doctrine. Indeed, the majority stated that "as *Goldfarb* and *Parker* established, the compulsion inquiry is to determine whether the specific anti-competitive activity at issue was actually that of the state acting as sovereign." Pet. App. at 76a, 77a n.16. This statement misconceives the binary analysis made clear in *Hoover*. Rather than inquiring whether the State was acting as sovereign, the Eleventh Circuit should have applied *Midcal* and determined whether "the anti-competitive conduct of the State's representative was contemplated by the State." *Hoover*, 52 U.S.L.W. at 4538. As will be demonstrated in section II, *infra*, the regulatory schemes under consideration here meet the test for a state action defense.

II. Application of the Midcal Test

A. The State Statutes Establish Pervasive Schemes for the Regulation of Motor Common Carriers.

Petitioner SMCRC contends that the state statutes herein provide clearly articulated and affirmatively expressed state policies to displace competition in the establishment of common carrier rates. The statutes mandate a pervasive scheme in which a public service commission is charged with regulating all aspects of

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[37] The author observes in a footnote that neither the Supreme Court nor the lower courts have required literal compulsion as a prerequisite to a finding of state action, Areeda, 95 Harv.L.Rev. at 438, 439 n.19, and explains that *Goldfarb* and *Cantor* "may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct." *Id. See also* Town of Hallie v. City of Eau Claire, 700 F.2d 376, 381-82 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3885 (U.S. June 12, 1984).

motor common carriers.[38] For example, the North Carolina legislature has adopted the following provision:

> For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges . . . or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement. . . .

Section 62-152.1(b), North Carolina General Statutes, App. A at 2a. Moreover, carriers engaging in such activity are relieved from the operation of North Carolina's state antitrust laws. Section 62-152.1(h), North Carolina General Statutes, App. A at 4a. Notwithstanding the absence of literal compulsion, the North Carolina statute hardly can be said to be anything short of a clear articulation and affirmative expression of state policy to allow collective formulation of intrastate rate proposals by motor common carriers. Indeed, the dissent below so found. Pet. App. at 91a (Hill, J., dissenting).

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[38] *See* Pet. App. 3a-7a. The statutes and regulations for each State are included as Appendices I-V to the Government's Motion to Strike (which Appendices are filed unnumbered in the Record). The current statutes may be found at: § 37-3-1 *et. seq.*, Code of Alabama 1975 (1977); § 46-7-1 *et. seq.*, Official Code of Georgia Ann. (1982); § 77-7-1 *et seq.*, Mississippi Code Ann. (1972); Chapter 62, North Carolina Gen. Stat. (1982); and § 65-15-101 *et seq.*, Tennessee Code Ann. (1982).

Similarly, the Georgia General Assembly has provided for collective rate-making procedures in its statute, which was amended in 1983[39] to provide as follows:

> The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage, and property and for all services rendered by motor common carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and on such notice as the commission may prescribe. Such tariffs shall also be subject to change on such notice and in such manner and on such notice as the commission may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatory rates and charges, the commission shall establish a collective rate-making procedure for all transportation for which it has heretofore prescribed rates. Failure on the part of any motor common carrier to comply with

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[39] Prior to the 1983 amendment, the Georgia statute provided:

> The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage, and property and for all services rendered by motor common carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and on such notice as the commission may prescribe. Such tariffs shall also be subject to change on such notice and in such manner as the commission may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatory rates and charges, the commission shall establish rate-making procedures for all motor common carriers, which procedures shall include, but not be limited to, collective rate-making procedures for the joint consideration, initiation, and establishment of such rates and charges. All motor common carriers shall be required to comply with such rate-making procedures.

Section 46-7-18, Official Code of Georgia Ann. (1982). Judge Hill also found that the Georgia statute met the *Midcal* criteria for state action, *Southern Motor Carriers*, Pet. App. at 91a (Hill, J., dissenting).

> this Code section or the rules and regulations promulgated under this Code section may result in suspension or cancellation of said carrier's operating authority by the commission.

Section 46-7-18, Official Code of Georgia Annotated (Supp. 1984), App. A at 4a. Pursuant to this statute, the Georgia Public Service Commission revised its rules relating to collective rate-making procedures to provide, *inter alia*, that each rate bureau must submit for Commission approval, "its procedures for the docketing and handling of proposed prescribed rates." Rule 1-3-1.14, Georgia Public Service Commission, App. A at 6a. The Rule further provides specific requirements for rate bureau procedures.

A pervasive regulatory scheme which contemplates collective rate activity by motor common carriers also is present in the Tennessee statute which was amended in 1983[40] to provide, *inter alia*, for the Tennessee Public Service Commission to determine whether to require uniform rates, joint rate studies, joint presentation of evidence in rate proceedings and joint publication of

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[40] The language relating to collective rate activity in Tennessee, prior to the 1983 amendment, was contained in Section 65-15-106, Tennessee Code Ann. (1982):

> In order to carry out the purposes of this chapter, including the publication and maintenance of just, reasonable and nondiscriminatory rates and charges, the public service commission is vested with the power and authority to establish rate-making procedures for all classes of motor common carriers, including collective rate-making procedures for the joint consideration, initiation and establishment of such rates and charges. Upon petition by a group of motor common carriers the commission shall be empowered to establish collective rate-making procedures, and all carriers party to such agreement shall be required to comply with such rate-making procedures. Nothing in this section shall be construed to prohibit any carrier from exercising its right of independent action in establishing rates and charges.

Once again, Judge Hill would have held this statute sufficient to confer state action immunity. Pet. App. at 91a. (Hill, J., dissenting).

tariffs. Section 65-15-119, Tennessee Code Ann. (Supp. 1983), App. A at 9a. Carriers also may file joint petitions presenting "contentions with respect to the action sought from the commission" but may not propose specific uniform rates, which are set by the commission. Section 65-15-119(g)(3), Tennessee Code Ann., App. A at 10a. Accordingly, the Tennessee legislature has clearly articulated and affirmatively expressed a state policy which specifically contemplates collective rate-related activities by motor common carriers in the context of state regulation.

The Alabama statute governing regulation of motor common carriers by the public service commission also envisions board regulatory powers. The commission "shall" have the duty:

> To supervise and regulate common carriers in all matters affecting the relationship between such common carriers and the traveling and shipping public.

Section 37-3-7(4), Code of Alabama 1975 (1977), App. A at 12a. Since 1942, the Alabama Public Service Commission has ordered common carriers to file an "an individual tariff, or to participate in an agency issue. . . ." (Brief of the State of Alabama and Alabama Public Service Commission *Amicus Curiae* in the District Court, R. 538). This policy was continued in rules adopted by the Commission in 1977. *Id.* at 538-39. Moreover, the members of the Commission, in an affidavit submitted to the district court, stated that:

> We hereby reassert that such collective action is necessary in order to make the Commission's regulation of intrastate motor carriers effective. If every said carrier initiated and filed with the Commission its own rates, charges, etc., in individual tariffs, the result under current budgetary restraints and staffing would be chaotic and disruptive and could result in a complete breakdown in the administration under the Alabama Motor Carrier Act of 1939.

R. 621, 622, ¶ 8. The Alabama Legislature's long-standing mandate that the Commission "shall" regulate all matters relating to motor common carriers, and the Commission's order implementing the legislative directive, again demonstrate a comprehensive regulatory scheme which meets both aspects of the state action test.

Finally, since 1938, the State of Mississippi has provided that:

> It is hereby declared to be the policy of the legislature to regulate motor carriers in the public interest to the end that the safety and welfare of the public in its use of the highways and of the transportation agencies by motor vehicle used thereon may be practiced; that the property of the State in its highways may be protected from unreasonable, improper and excessive use; that the inherent advantages of highway transportation may be recognized and preserved; that sound economic conditions in such transportation and among such carriers may be fostered; that the service by motor carriers may be adequate, economical, and efficient; *that reasonable charges may be made therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; that relations between motor carriers and other carriers may be improved and coordinated;* and that cooperation may be maintained with the governments of the United States and the several States, and with their duly authorized officials in carrying out the purposes and provisions of the Act.

Section 77-7-3, Mississippi Code Ann. (1972) (emphasis added), App. A at 14a. In a brief *amicus curiae* in the district court, the State of Mississippi and the Mississippi Public Service Commission stated that their "general and long established policy" is to "encourage all carriers within a definable class to maintain identical rates . . . for . . . identical service," and "to encourage collective action and rate proposals by the motor carriers themselves." R.

1065-66. This policy is reflected in Rule 39d(4), Mississippi Public Service Commission, App. A at 16a, which requires motor carriers to charge the lowest rate published by any motor carrier for the carriage of the same article or commodity between certain points within Mississippi. As with the other States, Mississippi has expressed grave doubts about its ability to engage in effective regulation absent collective activity. R. 1066.

In summary, each of the five States involved here legislatively contemplates the displacement of competition in the setting of intrastate motor carrier rates as an integral part of comprehensive and pervasive regulation of motor common carriers. The carriers, through organizations such as Petitioner SMCRC, respond to legislative and regulatory commission directives by providing collective rate studies, analysis and, where appropriate, proposed rates, all of which are submitted to the state commissions for decision pursuant to the regulatory processes.

B. The Pervasive Schemes of Regulation Meet the Midcal Test

As demonstrated in section II.A, *supra*, the legislatures of the States involved herein have adopted statutes directing extensive regulation of motor common carriers. Incident to and as a necessary and integral part of these regulatory schemes, the carriers are authorized to engage in collective activity for the purpose of assisting the state regulatory commissions in the performance of their duties. It is the position of Petitioner SMCRC that such activity is undertaken "pursuant to state policy to displace competition with regulation . . . ." *Lafayette*, 435 U.S. at 413. Moreover, the state policy in this case is "clearly articulated and affirmatively expressed" and there is active State supervision. *Midcal*, 445 U.S. at 105.

As to active State supervision, the Eleventh Circuit majority found that "the government and appellants agree that each state actively supervises the collective ratemaking process. . . ." Pet. App. at 73a. In particular, the court found that "the state commissions conduct hearings to review the reasonableness of proposed carrier tariffs and routinely suspend their effectiveness.' *Id.* at n.12. In addition to demonstrating active supervision, such a finding highlights the fact that the "program here was never intended to operate by force of individual agreement or combination." *Parker*, 317 U.S. at 350. Indeed, "it is the state, acting through the Commission, which adopts the program and which enforces it . . . in the execution of a governmental policy." *Id.* at 352. Such a scheme of regulation is hardly a new concept:

> [I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accomodations furnished, and articles sold.

Munn v. *Illinois*, 94 U.S. 113, 125 (1877).

Although Petitioner SMCRC does not contend that every anticompetitive act of a non-sovereign state representative will be protected by state action immunity merely by virtue of there existing a regulatory scheme, *Cantor*, 428 U.S. at 598, nonetheless this Court and other federal courts have recognized that a comprehensive system of state regulation which contemplates displacement of competition will shield the non-sovereign participants therein from the reach of the federal antitrust laws. In *Goldfarb*, where a minimum rate schedule adopted by a county bar association was found not to be within the scope of state action since it was not directed by the State as sovereign, 421 U.S. at 790, the Court went on to

recognize the State's interest in regulation of lawyers and point out that:

> In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

Id. at 793. Thus, *Goldfarb* was a cause in which the state regulatory scheme simply was not implicated in the challenged conduct.

By comparison, *Cantor* involved approval of private conduct within the framework of the regulatory scheme, but the anticompetitive activity, as later characterized in *Bates*, "was not essential to the State's regulation of electric utilities." *Bates*, 433 U.S. at 361. On the other hand, *Bates* itself involved "regulation of the activities of the bar" which "is at the core of the State's power to protect the public." *Id.*

The extent of the State's true interest in a regulatory program is measured not only by the clear articulation and affirmative expression of a state policy, but also by the extent to which the State supervises the activities undertaken by non-sovereign representatives pursuant to that policy. *Midcal*, 445 U.S. at 105-06. Therefore, the California statute in *Midcal* which clearly stated a legislative policy to displace competition, but which was devoid of active State involvement in or supervision of the program, could not be the basis for a valid state action defense.

The importance of the relationship between the State's regulatory interest and the challenged conduct also has been recognized by the circuit courts. The Ninth Circuit, for example, has noted that this Court "has rejected blanket state action immunity because some state regulation of the relevant business exists." *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 814, 823 (9th Cir.), *cert.*

denied, 456 U.S. 1011 (1982). The court went on to observe that, "[t]he purposes of the regulation must be to avoid the consequences of unrestrained competition in the market for which immunity is sought." *Id.* Similarly, the Third Circuit has stated that state action analysis properly examines, "Pennsylvania's regulatory interest in radio-telephone paging: the nature and quantum of that interest, as well as the extent to which the state has expressed and implemented it." *Mobilfone of Northeastern Pennsylvania, Inc.* v. *Commonwealth Tel. Co.*, 571 F.2d 141, 145 (3d Cir. 1978).[41]

By inquiring into the nature of the regulatory interest and the relationship to the challenged conduct, the courts in fact are attempting to determine whether there is a "clearly articulated and affirmatively expressed" state policy to displace competition. In making this analysis, circuit courts, other than the Eleventh Circuit in the case *sub judice*, have determined that the absence of literal compulsion does not preclude the existence of a clear state policy. *Turf Paradise*, 670 F.2d at 823 n.8; *Gold Cross Ambulance and Transfer and Standby Service* v. *City of Kansas City*, 705 F.2d 1005, 1012 n.11 (8th Cir. 1983); *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3885 (U.S. June 12, 1984). *See also* P. Areeda, *Antitrust Law*, § 212.5 (Supp. 1982). Indeed, to insist on literal compulsion as a prerequisite for state action immunity weakens the principle of federalism underlying the *Parker* doctrine by limiting a State's ability to regulate as it deems appropriate in its own sovereign judgment. Contrary to

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[41] *See also* First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984); Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984); *Town of Hallie*, 700 F.2d 376; *Caribe Trailer Systems*, 475 F. Supp. 711, *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980).

the opinion of the Eleventh Circuit majority,[42] it is entirely reasonable, as part of a comprehensive regulatory scheme, to allow private discretionary initiation of the regulatory mechanism. *Parker* and *New Motor Vehicle Board* allowed no less. Nor was private initiative necessarily fatal in *Cantor*, which turned on the absence of any relationship between the State's regulatory interest and the challenged conduct.

In finding a lack of compulsion herein, the court of appeals purportedly did not rely upon the fact that collective rate proposals are a matter of private initiative. See Pet. App. at 67a n.6. Rather, the court of appeals focused on the allowance of individual filings by carriers. See Pet. App. at 71a-72a n.11. Petitioner agrees that each State herein preserves the right of independent action. It should be noted that such independent actions are few in number, arising when special circumstances exist regarding a particular commodity or route.[43] The record demonstrates that independent actions are the exception and that collective rate proposals are the rule. The States have defended their regulatory programs because these programs could not handle the flood of independent ac-

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[42] Pet. App. at 74a.

[43] For example, Andrew C. Rymer, Director of the Motor Carrier Division of the Tennessee Public Service Commission, stated:

> In actual practice, general changes in motor carrier rates are seldom proposed by individual carriers. When individual carriers do propose rate changes, they usually seek to establish commodity rates to reflect real or fancied savings in operating costs arising from a regular movement or some extraordinary circumstances enabling the carrier to accord to the particular traffic a lower charge than that called for by the class rate structure. On the other hand, any changes made in the class rate structure, or a proposal for a general increase in the level of the class rates generally, usually is the product of a collective proposal by the carriers. As above indicated, in either instance the matter is analyzed and, with a full report, is referred to the commission for disposition.

Affidavit of Andrew C. Rymer, ¶ 11. (JA-79, 83).

tions which the Final Judgment herein would create. It is the existence of this right of independent action which apparently convinced the court of appeals majority that the state action defense did not apply. This conclusion is based on a misreading of the cases.

The existence of some degree of private choice within a state regulatory system does not automatically destroy the state action defense. In *Parker*, the activation of the statutory anti-competitive system was a result of private voluntary acts. 317 U.S. at 346. Moreover, if sufficient growers voluntarily requested the imposition of controls, the state permitted an individual grower under the program "to sell the remaining thirty percent of his standard raisins, denominated 'free tonnage,' through ordinary commercial channels . . ." if he obtained a certificate to do so. *Id.* at 348. Thus, *Parker* itself contains "free choice" elements analagous to the right of independent action herein. By their erroneous imposition of a "compulsion" requirement, the courts below have simply failed to deal with the real issue: whether the States have clearly articulated and affirmatively expressed policies which include the activities challenged by the Government herein. The application of state action immunity, particularly in the regulatory context, demands that both elements of the *Midcal* test be viewed together. Active state supervision such as is present herein responds to the concerns of the Eleventh Circuit majority by ensuring that any private initiative is in keeping with state policy. *Town of Hallie*, 700 F.2d at 384.

The States herein have clearly expressed state policies to displace unfettered competition with systems of regulation through their respective public service commissions. The court of appeals reasoned that absent compulsion, a private party could not carry out state policy "when it is left to the private party to carry out that policy or not as he sees fit." Pet. App. at 74a. This reasoning

amounts to a rejection of what is *in fact* the clear state policy of optional collective or individual filings. The record establishes that the States have consciously chosen systems of regulation under which state agencies oversee and set rates, and regulate numerous other aspects of transportation. The States have included collective rate proposals in their chosen systems of regulation. The basis for these state policies is not some clandestine conspiracy by motor carriers to violate the Sherman Act. Rather, these States have concluded that collective rate proposals are necessary to their ability to regulate motor carriers in the public interest.[44] Indeed, as Judge Hill noted in dissent:

> Initially, it seems clear that a state can articulate clearly a policy which incorporates both the benefits of joint ratemaking and separate filings. Indeed, such a policy of permissive joint ratemaking may be far superior to the complete mandatory joint ratemaking suggested by the majority. As the district court suggested, rate bureaus provide important support services to state regulatory bodies such as the staff experts and facilities necessary to collate data for the preparation of cost studies. *See United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 476 (N.D. Ga. 1979). *See generally* H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947). However, individual rate submissions also provide an important check on rate bureaus and preserve a certain degree of competition. For example, if an individual rate submission is significantly lower than a bureau rate proposal, the regulatory body is alerted to possible abuse of the privilege of collective ratemaking, and is better able to enforce and supervise its program than if there is no possibility of an individual rate proposal.

Pet. App. at 88a.

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[44] *See, e.g.*, § 62-152-1(b), North Carolina General Statutes, App. A at 2a; § 46-7-18, Official Code of Georgia Ann. (Supp. 1984), App. A at 4a.

As the States strongly contended in the district court, collective rate proposals are a necessary part of state regulation in the public interest.[45] State regulation also involves the uniform system of classifications of freight established by the National Motor Freight Traffic Association based on collective activity by carriers and applied as a part of intrastate as well as interstate rates.[46] The outlawing of collective proposals to change intrastate rates also affects the use of these uniform classifications, which are collectively established. Because of the complexity of the system, "no one carrier could bear the burden involved in classifying, in a just and reasonable manner, over 15,000 separate articles." Without the uniform classifications, "the result would be a tangled mess of conflicting classifications. . . ."[47]

The States have determined their policies and have made those policies known in "clearly articulated and affirmatively expressed" terms. The allowance of some competition is not an expression of lack of policy or neutrality as to collective activity. Rather, it is part of a comprehensive regulatory scheme which deliberately endorses and authorizes collective rate proposals while allowing independent action. Such a scheme is unlike *Boulder*, where this Court found that a home rule statute was at most neutral through silence on the displacement of competition in the cable television market; it is unlike *Cantor*, where the challenged conduct was unrelated to the State's regulatory interest; it is also unlike *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247, 1253 (9th Cir. 1983), *cert. denied*, 52

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[45] *See, e.g.*, Affidavit of J. C. Turner, ¶ 9, JA-50, 54; Affidavit of I. H. Hinton, ¶ 11, JA-55, 60-61; Affidavit of Andrew C. Rymer, ¶ 12, JA-79, 83; Affidavit of Robert A. Jones, ¶ 9, JA-86, 90-91.

[46] Affidavit of James C. Harkins at 4, 10 (JA-62, 66, 74).

[47] *Id.* at 11-13 (JA-75-78).

U.S.L.W. 3891 (U.S. June 12, 1984), wherein the court found in the statute an express statement of legislative neutrality as to displacement of competition.

In summary, the States involved here have clearly articulated and affirmatively expressed a policy of displacing competition among motor common carriers by replacing it with comprehensive regulatory schemes which contemplate, authorize, supervise and enforce collective rate formulation by the carriers. This is not the "gauzy cloak of state involvement" in a private price-fixing scheme; it is the direct action of the State actively supervising private parties in furtherance of important state regulatory interests. To attempt to separate the private activity from its place in the state regulatory process, as the Government seeks to do here, belies the very basis of federalism upon which the state action doctrine is based.

III. The Applicability of the Noerr-Pennington Doctrine

The pervasive schemes of regulation described in section II, *supra*, require motor common carriers to submit rate proposals to the state regulatory boards for review and action. Accordingly, the collective activities of the common carriers seeking to influence the regulatory bodies in the performance of their statutory duties are within the scope of the *Noerr-Pennington* doctrine and thus are exempt from federal antitrust laws.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court unanimously held that the Sherman Act did not apply to collective action by competing railroads seeking state legislation favorable to railroads and adverse to motor carriers. "[T]he Sherman Act . . . does not apply to . . . [collective] activities compris[ing] mere solicitation of governmental action with respect to the passage and

enforcement of laws." *Id.* at 138. The *Noerr* Court further reasoned:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from *associating together* in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Id. at 136 (emphasis added). Four years later, in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), the Court held that the protection first announced in *Noerr* extended to efforts to influence the executive branch. This same protection subsequently was extended to efforts to influence administrative proceedings. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

The *Noerr-Pennington* doctrine is grounded in First Amendment concerns, since:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Noerr, 365 U.S. at 139; *California Motor Transport*, 404 U.S. at 510-511. Thus, *Noerr-Pennington* protects both the private citizen's right to seek action by the government and the government's ability to gather information necessary to the decision-making process. Both of these concerns are damaged by the holding of the Eleventh Circuit *sub judice*.

The Eleventh Circuit panel, holding that *Noerr-Pennington* is inapplicable to the collective formulation of

a rate proposal for submission to a state regulatory agency, adopted in part the rationale of the district court:

> The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

Pet. App. at 43a-44a (quoting *U.S.* v. *Southern Motor Carriers Rate Conference, Inc.*, Pet. App. at 25a). This attempt to separate the activity preparatory to submission of rate proposals to the state commission reduces *Noerr-Pennington* to a meaningless shell. As the district court noted:

> If the defendants may, in the exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

Pet. App. at 25a. Nonetheless, both the district court and the circuit court concluded that the collective rate formulation activity had "independent significance" from the petitioning process.

This conclusion ignores the reality of the regulatory process described in section II, *supra*. Indeed, the very existence of the regulatory process means that the collective formulation of a rate proposal can have no independent significance since the motor common carriers cannot impose their own rates outside of the regulatory proc-

ess.[48] Nor is this case one in which the filing of a tariff is a *pro forma* exercise in which the real decision-making power in fact belongs to the private party. *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983). Unlike the *Litton* case, the filing of a tariff under the motor carrier regulatory schemes is not "a mere *incident* of regulation" in which "[t]he decision to impose and maintain the interface tariff was made in the AT & T boardroom, not at the FCC." *Id.*

As noted by both the district court, Pet. App. at 9a, and by the Eleventh Circuit, Pet. App. at 73a, the submissions of Petitioners are subject to extensive regulatory review. Indeed, it is established on the record that the state regulatory boards rely upon the filings as a significant source of information vital to the regulatory process. See *supra*, n.4. Thus, the case *sub judice* does not present a claim that "the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct." *Cantor*, 428 U.S. at 602. Rather, this case presents an extremely active regulatory process wherein the regulatory boards rely upon the private parties as a valuable source of information. Moreover, in light of the boards'

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[48] Petitioners are in full agreement with the dissenting opinion of Justice Stewart (joined by Justices Powell and Rehnquist) in *Cantor*, 428 U.S. 579, 615 (1976) with respect to the applicability of the *Noerr-Pennington* doctrine in this area of regulatory rate proposal petitioning activity. As Justice Stewart stated:

> [A] utility company thus engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under Noerr and the second—compliance with the terms of the tariff under the command of state law—is immune from antitrust liability under Parker and Goldfarb. . .

Id. at 624.

absolute and unquestioned control of the motor common carriers' financial well-being, the right to be able to provide such information to the regulatory boards is of the utmost importance to the carriers.

IV. Conclusion

It is the position of Petitioner SMCRC that the regulatory processes of the States involved herein constitute clearly articulated and affirmatively expressed state policies to displace competition among motor common carriers. Moreover, these policies contemplate and authorize collective activity by motor common carriers to formulate rate proposals for submission to the state regulatory boards. The state regulatory boards actively supervise this activity by routinely ordering hearings and extensive review of the rate proposals and by retaining final authority to approve, modify or disapprove the submissions. Accordingly, the activities of Petitioner SMCRC constitute "state action" which are not subject to the antitrust laws. Additionally, the collective formulation of rate proposals and the submission of those proposals to the state regulatory boards implicate important First Amendment rights which are protected under the *Noerr-Pennington* doctrine. For these reasons, the decision of

the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

49 U.S.C.A. § 10521(b) (Supp. 1984) provides:

This subtitle does not—(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier; (2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier; (3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or (4) except as provided in section 11503(a) and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

Section 62-130(a), N.C. Gen. Stat. (1982) provides:

(a) The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. A rate is made, fixed, established or allowed when it becomes effective pursuant to the provisions of this Chapter.

Section 62-152.1, N.C. Gen. Stat. (1982), provides:

(a) Definitions.—As used in this section, unless the context otherwise requires, the term:

(1) "Carrier" means any common carrier as defined in G.S. 62-3(6).

(2) For purposes of this section, carriers by rail are carriers of the same class, carriers by motor vehicles are carriers of the same class, carriers by pipeline are carriers of the same class, carriers by water are carriers of the same class, carriers by air are carriers of the same class, and freight forwarders are carriers of the same class.

(3) The term "antitrust laws" means the provisions of Chapter 75 of the General Statutes (N.C.G.S. 75-1, et seq.), relating to combinations in restraint of trade.

(b) For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by subsection (d) or (e) of this section) if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 as may be pertinent, the relief provided in subsection (h) shall apply with respect to the making and carrying out of such agreement; otherwise, the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this subsection.

(c) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under this section shall maintain such accounts, records, files and

memoranda and shall submit to the Commission such information and reports as may be prescribed by the Commission, and all the accounts, records, files and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(d) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that the agreement is of the character described in subsection (b) of this section and is limited to matters relating to transportation under joint rates or over through routes.

(e) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure.

(f) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which approval was granted is not or are not in conformity with the standards set forth in subsection (b) of this section, or whether any such terms and conditions are not necessary for the purposes of conformity with such standards, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standards, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standards or to the extent to which it finds such terms and conditions not necessary to insure

such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardships.

(g) No order shall be entered under this section except after interested parties have been afforded reasonable notice and opportunity for hearing.

(h) Parties to any agreement approved by the Commission under this section and other parties are, if the approval of such agreement is not prohibited by subsection (d) or (e) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the Commission.

(i) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of subsection (h) of this section. (1977, c. 219, s. 1.)

Section 46-7-18, Official Code of Ga. Ann. (Cum. Supp. 1984), provides:

The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage, and property and for all services rendered by motor common carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and

on such notice as the commission may prescribe. Such tariffs shall also be subject to change on such notice and in such manner as the commission may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatory rates and charges, the commission shall establish a collective rate-making procedure for all transportation for which it has heretofore prescribed rates. Failure on the part of any motor common carrier to comply with this Code section or the rules and regulations promulgated under this Code section may result in suspension or cancellation of said carrier's operating authority by the commission. (Ga. L. 1931, p. 199, § 8; Code 1933, § 68-613; Ga. L. 1980, p. 1119, § 2; Ga. L. 1983, p. 529, § 1.)

APPENDIX TO DOCKET NO. 11414-M

[GA. PUBLIC SERVICE COMMISSION]

REVISION OF RULE 1-3-1-.14 CONTAINING PROCEDURES FOR COLLECTIVE RATE-MAKING

Senate Bill Number 83 of the 1983 Session of the General Assembly of Georgia, enacted into law on March 15, 1983, amended Sections 46-7-18 and 46-7-63 of Chapter 7 of Title 46 of the Official Code of Georgia Annotated so as to change the provisions relating to the authority of the Commission to prescribe reasonable rates, fares and charges for motor common and contract carriers. The amended Code Sections provide, in part, that:

> "In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatroy rates and charges, the Commission shall establish a collective rate-making procedure for all transportation for which it has heretofore prescribed rates."

In compliance with the foregoing statutory mandate, the following collective rate-making procedure for all transportation for which the Commission has heretofore prescribed rates is hereby established by revising Rule 1-3-1-.14 to read as follows:

> (A) No person, tariff publishing agent, bureau or association (hereinafter referred to, collectively, as "tariff publishing agent") shall engage in collective rate-making activities unless and until said tariff publishing agent submits in writing to the Commission, for approval, its procedures for the docketing and handling of proposed prescribed rates. Such procedures shall, at a minimum, embrace the following essential elements:
>
> (B) A reasonable and fair method whereby any interested party may propose a change in the rates or rules in a tariff published by a tariff publishing agent

for consideration and vote by the participants to said tariff.

(C) The providing of notice to all participants in and subscribers to a tariff proposed to be changed regarding the proposal; said notice shall also fix a date, time and place for public hearing on the proposal whereby any interested party may appear at such hearing to give evidence or arguments in support of or in opposition to said proposal.

(D) A method whereby notice of rate proposals shall be available to anyone desiring same, including members of the public, upon payment of a reasonable subscription fee, except that such notice shall be mailed to all participants to the tariff without charge.

(E) Carrier participants to a tariff published by a tariff publishing agent may elect a rate committee for each type of carrier group to review proposed changes, to recommend as to the disposition of proposals, and to otherwise direct the affairs of their group, such as for the employment of counsel to handle petitions for rate changes, and for the direction of their tariff publishing agents in connection with docketing, tariff publications and other necessary routine requirements.

(F) Proposals for changes in tariffs, published by an agent for participating carriers as authorized by powers of attorney to the agent, shall be submitted in writing to the agent, or as may otherwise be directed by a governing rate committee. Meetings at which the public docket is to be considered will be called upon not less than ten (10) day's notice to the Committee and to the public.

(G) Each committee member will have one vote and the majority of the votes cast will govern. Proxy voting shall not be allowed.

(H) Formal minutes (not verbatim transcripts) must be kept on all meetings whereat collective ratemaking matters are considered.

A tariff publishing agent shall not, as such, file a protest with the Commission against any proposed tariff change.

The procedures herein authorized may be utilized by motor carriers to develop combined financial data as to operating expenses, revenues and estimated projections related thereto, for analysis and for submission to the Commission as and when required.

Nothing herein shall be construed to authorize the publication of any rate or tariff rule that is unlawful or otherwise prohibited by regulation of the Commission. Except when published to comply with the order of the Commission, all tariffs and amendments thereto will be subject to complaint by an interested party and may be suspended or rejected by the Commission.

GEORGIA, FULTON COUNTY:

I, Horace F. Hartley, Executive Secretary of the Georgia Public Service Commission, do hereby certify that the foregoing document is a true and correct copy of the original thereof, which is on file with the Commission. Given under my hand and official seal of the Georgia Public Service Commission, this 9th day of July 1984.

Horace F. Hartley
HORACE F. HARTLEY
Executive Secretary

Section 65-15-106(a), Tenn. Code Ann. (Supp. 1983), provides:

Powers of public service commission.—(a) The public service commission is vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state, to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; to regulate and supervise the schedules, service and method of operation of same; to

require the filing of annual and other reports and any other data; to require that the accounts and records of such motor carriers be kept and maintained in a manner consistent with good accounting practice; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

Section 65-15-119, Tenn. Code Ann. (Supp. 1983), provides:

Unjust and unreasonable charges prohibited—Uniform rates—Fixing of rates by commission.—(a) All charges made by any motor carrier or contract hauler for any service rendered, or to be rendered in the transportation of persons or property, or both shall be just and reasonable and every unjust and unreasonable charge for such service, or any part thereof is prohibited and declared unlawful, but the minimum rates established by the commission for contract haulers shall not be less than the rates prescribed for common carriers for substantially the same service.

(b) The commission, on its own motion, or on the petition of any one (1) or more motor carriers in a particular category of motor carriers, may institute a rule making proceeding to determine whether to require all motor carriers within a particular category to charge uniform rates under uniform tariff provisions for specific services. On determining that the adoption of such a rule would further the purposes of this chapter, on the basis of consideration of the factors set forth in § 65-5-109, the commission shall adopt such a rule, which shall specify procedures to be followed in its implementation, consistent with the provisions of this chapter and other applicable law.

(c) In fixing rates, whether uniform or not, for any category of carriers, the commission may require all car-

riers in that category to perform joint rate studies with respect to any or all types of service performed by that category of carrriers. Such joint rate studies may be, at the direction of the commission, performed through rate conferences, or bureaus, or associations of such motor carriers. The commission may further direct joint presentation of evidence in any rate making proceeding involving such category of carriers.

(d) The commission may direct the joint publication of tariffs for any category of carriers, either through rate conferences, or bureaus, or associations of such carriers, whether or not the rates, services or tariff rules and regulations for such carriers are uniform.

(e) Any one (1) or more motor carriers may petition the commission to recognize different types of service by such motor carriers.

(f) The commission may authorize carriers in the same category to provide joint or through service by agreement between one or more such carriers and shall establish procedures for fixing rates therefor.

(g) Rates may be fixed by the commission either:

(1) On its own motion;

(2) On petition filed by any motor carrier; or

(3) By the filing of a tariff by a carrier to become effective on a date specified in accordance with commission rules, unless suspended by the commission. Uniform rates for any category of carriers, however, shall be fixed only on the commission's own motion or on petition. Any such petition with respect to uniform rates shall not propose specific rates, but may present contentions with respect to the action sought from the commission. [Acts 1933, ch. 119, § 3; C.Supp. 1950, § 5501.3; T.C.A. (orig. ed.), § 65-1521; Acts 1983, ch. 474, § 2.]

Rule 1220-2-1-.40, Tenn. Public Service Commission, provides:

1220-2-1-.40 ADPTION OF I.C.C. AGREEMENT BETWEEN CARRIERS. The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; provided, however, that the final determination on any rates, fares, classifications, divisions, allowances, charges, rules and regulations or procedure shall be left in its final determination to the Tennessee Public Service Commission.

Section 37-3-7, Code of Ala. 1975 (1977), provides:

> It shall be the duty of the commission:
>
> (1) To regulate common carriers by motor vehicle as provided in this chapter, and, to that end, the commission may establish reasonable rules and requirements with respect to adequate service, transportation of passengers, baggage, freight and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees and safety of operation and equipment.
>
> (2) To regulate contract carriers by motor vehicle as provided in this chapter, and, to that end, the commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees and safety of operation and equipment.

(3) To regulate brokers as provided in this chapter, and, to that end, the commission may establish reasonable requirements with respect to the licensing, financial responsibility, accounts, records, reports, operations and practices of any such person or persons.

(4) To supervise and regulate common carriers in all matters affecting the relationship between such common carriers and the traveling and shipping public.

(5) To administer, execute and enforce all provisions of this chapter and to make all necessary orders in connection therewith and to prescribe rules, regulations and procedure for such administration.

(6) To inquire into the organization of motor carriers and brokers and into the management of their business, to keep itself informed as to the manner and method in which the same is conducted and to transmit to the legislature, from time to time, such recommendation as to additional legislation relating to such carriers or brokers as the commission may deem necessary.

(7) To establish from time to time such just and reasonable classification of brokers or of groups of carriers, included in the term "common carrier by motor vehicle" or "contract carrier by motor vehicle," as the special nature of the services performed by such carriers or brokers shall require and such just and reasonable rules, regulations and requirements, consistent with the provision of this chapter, to be observed by the carriers or brokers so classified or grouped as the commission deems necessary or desirable in the public interest.

(8) Upon complaint in writing to the commission by any person, state board, organization or body politic or upon its own initiative without complaint, to investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant

thereto. If the commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the commission shall issue an appropriate order to compel the carrier or broker to comply therewith.

After a decision, order or requirement has been made by the commission in any proceeding under this chapter, any party thereto may make application to the commission for reconsideration or rehearing of the same, or of any matter determined herein, and it shall be lawful for the commission in its discretion to grant such reconsideration or a rehearing, if sufficient reason therefor is made to appear. Such application shall be filed within 30 days after date of such decision, order or requirement; provided, that the commission may by order extend such time for not more than 30 days additional. Applications for reconsideration or rehearing shall be governed by such general rules as the commission many prescribe. No such application shall excuse any motor carrier or broker from complying with or obeying any decision or requirement of the commission or operate in any manner to stay or postpone the enforcement thereof without the special order of the commission. If, after such reconsideration or rehearing, it shall appear that the original decision, order or requirement is in any respect unjust or unreasonable, the commission may reverse, change or modify the same accordingly. Any decision, order or requirement made after such reconsideration or rehearing shall be subject to the same provisions as an original decision, order or requirement; provided, however, it shall not be subject to any further application for reconsideration or rehearing by the commission. (Acts 1939, No. 669, p. 1064, § 5; Code 1940, T. 48, § 301(5).)

Section 37-3-19(g), Code of Ala. 1975 (1977), provides:

(g) In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common carriers by motor vehicle, the commission shall give due consideration, among other things, to the effect of rates upon the movement of traffic by such carriers to the need, in public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service, and the need of revenues sufficient to enable such carriers, under honest, economical and efficient management to provide such service.

Section 77-7-3, Miss. Code Ann. (1972) provides:

It is hereby declared to be the policy of the legislature to regulate motor carriers in the public interest to the end that the safety and welfare of the public in its use of the highways and of the transportation agencies by motor vehicle used thereon may be practiced; that the property of the state in its highways may be protected from unreasonable, improper and excessive use; that the inherent advantages of highway transportation may be recognized and preserved; that sound economic conditions in such transportation and among such carriers may be fostered; that the service by motor carriers may be adequate, economical, and efficient; that reasonable charges may be made therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; that relations between motor carriers and other carriers may be improved and coordinated; and that cooperation may be maintained with the governments of the United States and the several states, and with their duly authorized officials in carrying out the purposes and provisions of

this chapter. This chapter shall apply to persons and motor vehicles engaged in interstate commerce to the extent permitted by the Constitution and laws of the United States and as provided herein. SOURCES: Codes, 1942, § 7633; Laws, 1938, ch. 142.

Section 77-7-221, Miss. Code Ann. (1972) provides:

In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common or restricted common carriers by motor vehicle, the commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by such carriers; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such services; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any such carrier, there shall not be taken into consideration or allowed as evidence or elements of value of the property of such carrier, either good will, earning power, or the certificate under which such carrier is operating. In applying for and receiving a certificate under this chapter, any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of all transferees or lessees of such certificate. SOURCES: Codes, 1942, §§ 7663, 7664; Laws, 1938, ch. 142.

Rule 39d(4), Miss. Public Service Commission, provides:

> Where two or more freight rates are published to apply on certain articles or commodities between points in Mississippi, by the same motor carriers, or by different motor carriers, the lowest rate, whether class or commodity, shall be applied over all motor carriers accepting and transporting freight between such points; and in no instance should a rate be published or applied which exceeds the aggregate of published intermediate rate, class or commodity, or class and commodity, unless and until proof of the reasonableness of such rate is submitted to and approved by the Commission, provided that in the initial filing penalties will not apply for violation of this rule until such is called to the attention of the carriers and reasonable opportunity is given for adjustment or justification.

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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit, Unit "B"

BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

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QUESTIONS PRESENTED FOR REVIEW

The Interstate Commerce Act authorizes, but does not compel, motor common carriers of property to engage in the collective formulation of interstate rate proposals pursuant to agreements approved by the Interstate Commerce Commission. The North Carolina Public Utilities Act authorizes, but does not compel, motor common carriers of property to engage in the collective formulation of intrastate rate proposals pursuant to agreements approved by the North Carolina Utilities Commission. Against this background, the questions presented are:

1. Whether, in disregard of controlling decisions of this Court involving the state action doctrine, the court below erroneously inferred a Congressional intent to condemn under the federal antitrust laws activities conducted in intrastate commerce which are expressly authorized and immunized from those laws when conducted in interstate commerce?

2. Whether, contrary to prior decisions of this Court, the court below erroneously construed the state action doctrine to require as a prerequisite to its application that a state formally compel private parties to act in a manner violative of federal antitrust laws?

3. Whether, contrary to prior decisions of this Court, the court below erroneously held that the *Noerr-Pennington* doctrine is inapplicable to the collective formulation of rates to be proposed to state regulatory commissions?*

---

* This brief addresses Questions 1 and 2. As to Question 3, petitioner North Carolina Motor Carriers Association, Inc. concurs with and adopts the brief of petitioner Southern Motor Carriers Rate Conference, Inc.

PARTIES

The caption of this brief contains the names of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the District Court. North Carolina Motor Carriers Association, Inc. has no parent, subsidiary or affiliated companies.

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SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

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Petitioners,

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UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit, Unit "B"

BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia (Pet. App. 1a-30a) is reported at 467 F. Supp. 471 (N.D. Ga. 1979). The opinion of the Fifth Circuit, Unit "B" (Pet. App. 31a-60a) is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). The opinion of the Fifth Circuit, Unit "B" on rehearing *en*

banc (Pet. App. 63a-93a) is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983).

JURISDICTION

The judgment of the Fifth Circuit, Unit "B", was entered on April 5, 1982. A petition for rehearing and suggestion for rehearing *en banc* was granted on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B", was entered on April 11, 1983. On April 21, 1983, petitioners moved the Fifth Circuit, Unit "B", for a stay pending the filing of a petition for writ of certiorari. On May 6, 1983 that court granted the motion and stayed its mandate through May 30, 1983. The petition for a writ of certiorari was filed on May 27, 1983, and granted on June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 62-152.1(b) of the North Carolina Public Utilities Act provides:

> (b) For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges be-

> tween carriers and compensation paid or received from the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by subsection (d) or (e) of this section) if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 as may be pertinent, the relief provided in subsection (h) shall apply with respect to the making and carrying out of such agreement; otherwise, the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this subsection.

Section 62-152.1(h) of the North Carolina Public Utilities Act provides:

> (h) Parties to any agreement approved by the Commission under this section and other parties are, if the approval of such agreement is not prohibited by subsection (d) or (e) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the Commission.

STATEMENT OF THE CASE

Procedural History

Respondent United States (hereinafter Government) brought suit in the United States District Court for the Northern District of Georgia seeking an injunction against alleged violations of Section 1 of the Sherman Act,

15 U.S.C. § 1. Named as defendants were three organizations of motor common carriers of property, commonly known as rate bureaus, operating in Alabama, Georgia, Mississippi, North Carolina and Tennessee. In addition to petitioner North Carolina Motor Carriers Association, Inc., which operates only in North Carolina, the complaint named the Southern Motor Carriers Rate Conference, Inc. and the Motor Carriers Traffic Association, Inc. The gist of the complaint was that these bureaus were serving as forums through which their members conspired to fix prices by collectively formulating rate proposals to be filed with the regulatory commissions of the five states. Complaint ¶¶ 24-25 (J.A. 9-10).

The bureaus filed motions to dismiss for failure to state a claim upon which relief could be granted, and for lack of subject matter jurisdiction. The Government filed a motion to strike certain affirmative defenses. In an order reported at 439 F. Supp. 29 (R.404), the District Court denied the bureaus' motions and struck certain affirmative defenses. In its order the Court invited the Attorneys General of the five states to participate as *amici curiae* (R. 434-435). 439 F. Supp. at 52.

The National Association of Regulatory Utility Commissioners (NARUC) was granted intervention as a party-defendant by the District Court (J.A. 43-48). The motion of National Motor Freight Traffic Association, Inc. (NMFTA) to intervene as a defendant was denied, but NMFTA was invited by the Court to participate as *amicus curiae* (R. 1139).

The Government and the three rate bureaus entered into a stipulation of facts (J.A. 39-42), and following the completion of discovery the parties filed cross-motions for summary judgment. The bureaus, supported by NARUC and the *amicus curiae* briefs of the five states and

NMFTA, argued, *inter alia*, that their conduct was immune from the federal antitrust laws by virtue of the state action doctrine established in *Parker* v. *Brown*, 317 U.S. 341 (1943).

The District Court granted the Government's motion for summary judgment. The Court held that the state action doctrine did not apply because none of the five states expressly compels collective rate formulation by motor common carriers. It held that the absence of such compulsion is "a threshhold barrier to application of the state action doctrine" (Pet. App. 18a). The District Court then held that the challenged activities constituted price fixing in violation of the Sherman Act notwithstanding that the state regulatory agencies themselves fix the rates of motor common carriers—either by prescribing them or by approving, after a process of active oversight, those proposed by carriers. The Court concluded that the "defendants' practices of collective rate coordination and publication are *per se* violations of Section 1, subject to injunction by this court" (Pet. App. 28a).

On appeal, a divided panel of the Fifth Circuit, Unit "B" affirmed. Judge Johnson, joined by Judge Scott of the Middle District of Florida, sitting by designation, agreed with the District Court that a court need look no further than to determine whether the challenged activity is compelled by the state acting as sovereign. Judge Hill dissented on the ground that this case is governed by the two-pronged test set forth in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which was decided after the District Court decision.[1] Since it was conceded that there was "active

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[1] In *Midcal* this Court set forth the following test for state action:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. 445 U.S. at 105.

supervision",[2] Judge Hill addressed "clear articulation". He found that the North Carolina statutory provisions "unmistakenly indicate that collective rate formulation is part of the regulatory policy of the State of North Carolina" (Pet. App. 58a). Accordingly, Judge Hill would have held the activities of the rate bureaus in that state immune (Pet. App. 58a).

The Fifth Circuit granted rehearing *en banc* to consider the following two issues: "first whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions; and second whether, if state compulsion is not necessary, the state policies here at issue were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply" (Pet. App. 64a). On rehearing, a divided court affirmed, 8-4. Judge Johnson, again writing for the majority, reiterated his view that the Court need not reach the second issue because "compulsion is required of private parties." Judge Hill, again in dissent, pointed to the conflict between the holding of the majority and the "clear and explicit" holding of this Court in *Midcal* (Pet. App. 84a).

Judge Clark, who joined Judge Hill's dissent, also wrote a separate dissent in which he expressed his concern about the unfairness of the result reached by the majority:

> What disturbs me so deeply about the majority opinion is that it completely ignores the Interstate Commerce Act, public policy, history, and fairness. As pointed out by Judge Hill, the functions of rate bureaus or conferences declared illegal by the majority have been accepted national policy for more than

[2] See Pet. App. 37a, note 5 and Pet. App. 57a, note 6.

> thirty years. These same defendants have performed the identical functions for interstate carriers whose rates are fixed by the Interstate Commerce Commission. These functions, when performed by these bureaus for interstate carriers are exempted from the Antitrust Act by the Interstate Commerce Act. . . .
>
> It is patently unfair at this late date to declare that these defendants violated the antitrust act when following identical procedures that are not violative of the antitrust act when done in interstate commerce (Pet. App. 92a-93a, footnote omitted).

Statement of Facts

Motor common carriers of property operating in intrastate commerce in North Carolina are deemed public utilities and, by virtue of the North Carolina Public Utilities Act, Chapter 62 of the North Carolina General Statutes (NCGS), their intrastate rates and services are subject to pervasive economic regulation. North Carolina's policy underlying her regulatory scheme, set forth in NCGS § 62-259 is to:

> . . . promote and preserve adequate, economical and efficient service to all communities of the State by motor carriers; to encourage and promote harmony among all carriers and to prevent discrimination, undue preferences or advantages, or unfair or destructive competitive practices between all carriers; to foster coordinated statewide motor carrier service; and to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce.

To carry out this policy the Utilities Act vests regulatory authority over motor carriers in the North Carolina Utilities Commission (NCUC). The NCUC is charged with the exclusive responsibility to fix and establish rates for all motor common carriers subject to its jurisdiction.

Specifically, the NCUC is required to "make, fix, establish, or allow just and reasonable rates." NCGS § 62-130. Carriers are not permitted to deviate from the rates so made. Nor are they permitted to discriminate against particular persons, localities or classes of service. NCGS §§ 62-139, 62-140. Carriers of property over regular routes must maintain through routes and joint rates with other such carriers. NCGS § 62-146(b).[3]

An integral feature of North Carolina's rate regulatory scheme is NCGS § 62-152.1, which sets forth a procedure "to realize and effectuate" the following clearly articulated policy: "For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class." NCGS § 62-152.1(b). The procedure authorizes motor common carriers to enter into collective ratemaking agreements and to apply to NCUC for approval of those agreements. Approval immunizes the parties to an agreement from the North Carolina antitrust laws with respect to the making and carrying out of the agreement in conformity with the terms and conditions prescribed by the Commission. NCGS § 62-152.1(h). The NCUC may approve only agreements which satisfy the specific criteria set forth in NCGS § 62-152.1 and which are found to be in furtherance of the uniform rate policy and the other regulatory policies set forth in NCGS §§ 62-2 and 62-259.

NCGS § 62-152.1(c) requires approved rate bureaus to maintain such records and to file such reports as the

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[3] A "through route" is an arrangement between connecting carriers for the continuous carriage of goods from an origin on the line of one to a destination on the line of another. A "joint rate" is a rate applied jointly by the carriers party to a through route covering the carriage of goods from origin to destination.

NCUC may require. In addition, the NCUC is authorized to investigate bureaus to determine if they are acting in accord with regulatory policy and standards, and to modify any approved agreement to the extent necessary to insure conformity with that policy and those standards. NCGS § 62-152.1(f).

The North Carolina Motor Carriers Association (NCMCA) operates pursuant to an agreement among approximately 170 motor common carriers of property approved by the NCUC under NCGS § 62-152.1 (R. 1315, 1340). Continuously since 1943, it has served as the forum through which its members collectively formulate rate proposals to the NCUC, while also serving as their agent for the publication of rates in tariff form and for the filing of tariffs with the NCUC.

NCGS § 62-152.1 is modeled on its federal counterpart, former 49 U.S.C. § 5b, amended and recodified at 49 U.S.C. § 10706(b), which expressly immunizes from the federal antitrust laws collective ratemaking by motor common carriers of property under agreements approved by the Interstate Commerce Commission. Accordingly, the NCMCA agreement establishes ratemaking procedures which are in all important respects identical to those in ICC-approved agreements (R. 1268-1269). Rates are formulated in a rate committee on which each member of NCMCA is entitled to have a representative (R. 1315-1316). Meetings of the committee are open to users of transportation services — shippers and receivers — and they participate with carriers in the discussion of rate proposals (R. 1316). From 1947 to 1978, approximately ninety percent of the motor carrier rate proposals to the NCUC were formulated through NCMCA or one of the other two rate bureaus named in the Government's complaint (J.A. 56).

The NCUC has a large staff which thoroughly reviews all rate proposals formulated through NCMCA (J.A. 58-60). In addition, it has an independent arm, known as the Public Staff, which represents the consuming public in the establishment of public utility rates (J.A. 50-51). The Public Staff also reviews and analyzes all rate proposals made by NCMCA and makes recommendations thereon to the NCUC (J.A. 51-53). The NCUC sets for formal hearing all proposals for general rate increases (J.A. 59) and all other proposals the Public Staff recommends be formally heard (J.A. 58).

The Director of the Transportation Division of NCUC and the Coordinator, Accounting Traffic Section of the Public Staff both submitted affidavits to the District Court setting forth their support for collective rate proposing and describing NCMCA's essential role in the scheme of regulation (J.A. 50-61). In addition, the State of North Carolina, through its Office of Attorney General, and the NCUC filed joint *amicus curiae* briefs with the Court of Appeals and this Court explaining why the collective formulation of rate proposals to NCUC is necessary to the effectuation of North Carolina's rate regulatory scheme. As they pointed out at page 12 of their brief in support of the petition for writ of certiorari:

> An examination of the North Carolina Public Utilities Act discloses that the State of North Carolina has chosen, in furtherance of its overall motor carrier transportation policy, to substitute the regulation of motor carrier rates for competition. The economic regulation of motor carrier rates by the State is in furtherance of the expressly announced goals to provide just and reasonable rates for motor carrier transportation without unjust discrimination or undue preferences; to promote and preserve adequate economical and efficient service to all the communities of the State by motor carriers; and to foster a

> coordinated statewide motor carrier service. . . . The State should retain the freedom to pursue its regulatory policies with such flexibility as will meet the needs of its citizens. If the decision of the District Court is left undisturbed, the State of North Carolina will be required to abandon its regulatory scheme of determining carrier rates by collective rate proposing and to determine carrier rates based upon the separate rate applications of more than 600 individual motor carriers. The result will be the inability of the State of North Carolina to discharge its duty to ensure that motor carrier rates are just, reasonable, and nondiscriminatory.

SUMMARY OF ARGUMENT

The state action doctrine is grounded on the proposition that while Congress has the power to preempt state regulation of intrastate commerce affecting interstate commerce, an unexpressed purpose to do so is not to be lightly inferred. Notwithstanding that Congress expressly reserved to the states the power to regulate intrastate motor carrier transportation, the Court below held that Congress intended to nullify state laws which exercise that power in the same manner as the federal government exercises its power to regulate interstate motor carrier transportation.

The Interstate Commerce Act immunizes from the antitrust laws the collective formulation of interstate rates by motor common carriers pursuant to agreements approved by the Interstate Commerce Commission. Such agreements *must guarantee* each carrier the absolute right to take independent action. The Court below held that petitioner's agreement, which was approved by the North Carolina Utilities Commission under a law modeled after the Interstate Commerce Act, could not immunize the collective formulation of intrastate rates unless it

forbids carriers to take independent action. Thus, the Court held that a state has only one of two choices—either permit absolutely free competition or eliminate competition altogether.

The Court below held "[s]pecifically, a defense of state action fails because this litigation was brought against private defendants" rather than state defendants. (Pet. App. 71a). This elevates form over substance because it holds that immunity from the antitrust laws *vel non* depends on whether a plaintiff chooses to sue an officer of the state or a private person.

Only last term in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. ___, 80 L.Ed.2d 590 (1984), the Court stated that when anti-competitive activities are carried out, not by the state itself, but "by others pursuant to state authorization," it must be determined whether those others are acting pursuant to a clearly articulated and affirmatively expressed state policy and whether the state actively supervises their activities. 80 L.Ed.2d at 599.

In stating its test in *Midcal* and restating it in *Hoover*, this Court examined all of its major decisions dealing with the state action doctrine. Included were cases involving private defendants as well as cases involving public defendants. Indeed, in *Hoover*, the Court pointed out that it had applied that test in both *Midcal*, in which the defendant was a state agency, and *Cantor* v. *Detroit Edison Co.*, 429 U.S. 579 (1976), in which the defendant was a private party. Thus, the Court clearly rejected the basic premise upon which the decision below rests.

ARGUMENT

Congress Did Not Intend To Forbid Under The Antitrust Laws Activity In Intrastate Commerce That It Permits In Interstate Commerce

Since its 1943 decision in *Parker* v. *Brown*, *supra*, this Court has recognized that Congress did not intend the antitrust laws to deprive the states of their sovereign power to regulate intrastate commerce as they see fit. That decision establishing antitrust immunity for state regulatory programs was "grounded in our federal structure. 'In a dual system of government in which, under the Constitution, the states are sovereign, save only as congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to congress' " *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 103 (quoting *Parker* v. *Brown*, 317 U.S. at 351). In short, the basic *Parker* proposition is that, while Congress has the power to preempt state economic regulation, an intent to do so will not be inferred absent clear evidence. Applying that proposition here, it is clear that the decision below necessarily infers that the Sherman Act condemns intrastate activities which are the same as the interstate activities Congress expressly authorized and immunized under the Interstate Commerce Act.

The Interstate Commerce Act authorizes, but does not compel, motor common carriers operating in interstate commerce to engage in the collective formulation of rates pursuant to agreements filed with and approved by the Interstate Commerce Commission. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b).

In the five states involved in this proceeding and most other states, the collective formulation of rate proposals is authorized, but not compelled, by statute or administrative rule or policy. North Carolina has adopted a statute which authorizes the collective formulation of rate proposals and immunizes that activity from its antitrust laws in language that is virtually identical to former Section 5a of the Interstate Commerce Act, former 49 U.S.C. § 5b, 62 Stat. 472. The provisions relating to collective formulation of rate proposals are designed to parallel and complement the federal provisions relating to collective rate formulation. Hence, it is plainly untenable to infer, as the Court below did, that Congress intended to preempt state law designed to effectuate in intrastate commerce the same policies that the federal law is designed to effectuate in interstate commerce. The illogic of the Court's holding is underscored by the anomaly that the same carriers which *do not* violate the federal antitrust laws when they collectively formulate an interstate rate for the Raleigh, N.C. to Charlotte, N.C. leg of an interstate shipment *do* violate those laws when they collectively formulate an intrastate rate for an intrastate shipment of the same commodity moving between the same points in the same truck at the same time.

Congress expressly reserved to the states the power "to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b). Yet, under the decision below, the states cannot exercise this power in the same manner as the federal government exercises its power over interstate motor carriers. Under 49 U.S.C. § 10706(d)(2), the Interstate Commerce Commission "may not approve an agreement . . . establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take inde-

pendent action before or after a determination is made under that procedure." Under the decision below, the *inclusion* of such a provision in an agreement results in the *loss* of antitrust immunity.

The Court below blithely suggested that "if collective ratemaking is as desirable as appellants insist, then it should be but a small step for the states to compel it of all carriers" (Pet. App. 80a). But, as the Government itself points out, "there would presumably be less competition if the states did so, since some carriers now file individual rates . . . ." (Brief for the United States in Opposition to Petition For A Writ of Certiorari, 16). Thus, both the Court below and the Government here are saying that the states can bring their regulatory schemes into consonance with the federal antitrust laws only by eliminating competition altogether.

It is inconceivable that Congress intended the antitrust laws to be applied to produce such a result. Only recently, Congress indicated that it was aware of the existing schemes under which the various state provisions relating to collective rate formulation parallel and complement the federal provisions, and it made a deliberate determination to maintain the status quo with respect to those schemes. In the legislative history of the Motor Carrier Act of 1980, there is a discussion of collective formulation of intrastate rates *without* specific authorization from the states involved. The following appears at page 29 of the House Report:

> In the bill as originally introduced, there was a provision which prohibited the rate bureaus from docketing or handling rates for intrastate transportation without specific authorization from the states involved. The Committee eliminated this section because it received very little evidence on that particular subject. The Committee intends to continue look-

ing at this area, but for the time being, the status quo should apply with respect to intrastate ratemaking. H.R. Rep. No. 1069, 96th Cong., 1st Sess. *reprinted in* 1980 U.S. Code Cong. & Admin. News 2283, 2311.

Compulsion On Private Persons To Act Anticompetitively Is Not A Prerequisite To Immunity For Their Actions

The Court below held that "[s]pecifically, a defense of state action fails because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively" (Pet. App. 71a). It stated that "*Parker* immunity for state defendants does not require compulsion" (Pet. App. 74a). The illogic of this wooden compulsion test is clear from the facts of this case. Suppose some party, *e.g.*, a disgruntled shipper or carrier or the Department of Justice, had judicially challenged the NCUC's decision to approve the NCMCA agreement on the ground that approval was barred by the federal antitrust laws. Under the Court's thesis, *Parker* immunity would be found because the state has clearly articulated its policy and actively supervises the implementation of that policy. How can the opposite result be reached because NCMCA rather than the NCUC is the defendant? This elevates form over substance and leaves in the hands of plaintiffs the power to determine the applicability of federal antitrust laws. Indeed, under this thesis *Parker* itself would have been decided differently had the defendant been a private party instead of a state official. This conclusion is untenable.

In *Parker* the Court considered a California statute that authorized private raisin growers to jointly propose and petition a state commission to approve a marketing program that would restrict competition among the producers in order to maintain prices. The program was to be administered by the commission under authority of a statute which provided penalties for violations of the

program. The Court held that an approved program was immune from the antitrust laws:

> It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. 317 U.S. at 352.

Thus, the principle of state action immunity from antitrust laws was established in a case in which, as here, the formulation and proposal of the program to state authorities was the voluntary collective action of private persons. Indeed, *Parker* stands for the proposition that where the state authorizes private parties to act jointly as an integral part of a state regulatory program, and where the state engages in careful oversight of, and retains final responsibility to approve or disapprove their actions, approved action constitutes state action immune from antitrust liability.

The Court below relied on *Goldfarb* v. *Virginia State Bar Association*, 421 U.S. 773 (1975) and *Cantor* v. *Detroit Edison Co.*, *supra*, as support for its holding that compulsion is necessary for immunity. But *Goldfarb* and *Cantor* were the first state action cases decided by this Court in the more than thirty years after *Parker*. Since 1976, when *Cantor* was decided, there have been a series of cases in which the state action doctrine has evolved and matured. In 1980, in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*, this

Court reviewed its cases and synthesized from them the following test for state action immunity:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. 445 U.S. at 105 (citing *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (Opinion of Brennan, J.)).

As Judge Hill pointed out in his dissent, in formulating this test, this Court "did not limit its analysis to those cases involving only state defendants, but instead examined all of its major decisions construing the state action exemption" (Pet. App. 82a). As Judge Hill observed:

> The line of cases discussed in this portion of *Midcal* include those involving private defendants, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), as well as those involving governmental defendants, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). After discussing each of these cases, a *unanimous* Court concluded that "[t]hese decisions establish two standards for antitrust immunity under *Parker* v. *Brown*," and proceeded to enunciate the two-part test set forth above. 445 U.S. at 105. . . . The Court did not purport to restrict application of its test to governmental entities; nor did it purport to derive the substance of its test from those cases involving governmental defendants. Indeed, as evidenced by the facts of the present case, to have drawn such a distinction on the basis of the identity of the defendant would have proven unreasonable and inconsistent with the federalism concerns underlying the doctrine" (Pet. App. 82a-83a) (emphasis in original).

As Judge Hill suggests, we submit that *Midcal* is the Court's refinement of *Goldfarb* and *Cantor* into a more flexible and practical test that allows the federal courts to better respond to the complexities of state regulation. While a majority of the Fifth Circuit disagreed with this analysis, the Ninth Circuit reached a similar conclusion in *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 823 n. 8 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982). There it stated: "It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015."

Legal scholars have also reached the same conclusion. As Professor Areeda has observed:

> Indeed, *Goldfarb* and *Cantor* may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct. In *Goldfarb*, the defendants were private groups enforcing fee schedules without adequate state authority or supervision. The essence of *Cantor* was the state's presumed indifference to the utility's "free" light bulb program; state approval, even if deliberate, was not intended to displace the antitrust laws. Areeda, *Antitrust Immunity for "State Action" After LaFayette*, 95 Harv. L. Rev. 435, 439 n. 19 (1981).

This analysis is borne out by the Court's latest decision in this area, *Hoover* v. *Ronwin*, *supra*. There, the Court again examined its state action decisions beginning with *Parker*. It concluded that when a state legislature adopts legislation or a state supreme court acts in a legislative

capacity, the actions are those of the state and "*ipso facto* are exempt from the operation of the antitrust laws." However, when the anti-competitive conduct is "by others pursuant to state authorization" there must be a clear articulation of policy and active supervision of its implementation. This is the test whether the others be nonsovereign public officials or private persons. As the Court pointed out in *Hoover*, it had applied that test in both *Midcal*, in which the defendant was a state agency, and *Cantor*, in which the defendant was a private party. Referring to those cases, the Court said: "In each of those cases it was necessary for the court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the state 'acting as a sovereign.'" 80 L.Ed.2d at 607, n. 33. Thus, the Court clearly rejected the basic premise upon which the decision below rests — that private parties are subject to a different test for state action immunity than are nonsovereign public parties.

CONCLUSION

North Carolina has "clearly articulated and affirmatively expressed" that its policy respecting motor common carriage is to replace unfettered competition with regulation. The fact that its policy contemplates some price competition among parties to a collective rate-making agreement, just as does the corresponding federal policy, does not render that policy violative of the federal antitrust laws. Clearly, too, North Carolina actively supervises its policy. This Court has made clear that if these two facts are present, the state action doctrine immunizes the challenged conduct from the antitrust laws whether or not the defendant is a private

person or a nonsovereign public official and whether or not the conduct is compelled. Therefore, the judgment of the Fifth Circuit, Unit "B", should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether collective intrastate rate agreements among private motor carriers, which are permitted but not compelled by state law, constitute "state action" and therefore are not subject to the Sherman Act's prohibition against price fixing.

2. Whether the *Noerr-Pennington* doctrine immunizes collective intrastate rate agreements from the Sherman Act because the privately agreed-upon rates are subsequently submitted to state regulatory authorities.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 63a-93a) is reported at 702 F.2d 532. The panel opinion of the court of appeals (Pet. App. 31a-60a) is reported at 672 F.2d 469. The opinion of the district court (Pet. App. 1a-30a) is reported at 467 F. Supp. 471. The judgment entered by the district court (J.A. 93-102) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. The petition for a writ of certiorari was filed on May 27, 1983, and granted on

June 11, 1984. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutes as amended to date are set forth in the appendix to the brief of petitioner Southern Motor Carriers Rate Conference (Br. App. 1a-16a).

STATEMENT

1. Petitioners Southern Motor Carriers Rate Conference, Inc. (SMCRC) and North Carolina Motor Carriers Association, Inc. (NCMCA) are motor carrier rate bureaus.[1] These rate bureaus provide a forum in which competing member carriers discuss and agree on intrastate motor carrier rates, which are then submitted to state public service commissions for their approval. Pet. App. 7a-8a; 63a-64a.[2]

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[1] A third rate bureau, the Motor Carriers Traffic Association (MCTA), was also a defendant in this suit in the district court. MCTA did not, however, appeal from the district court's entry of an injunction against it. See pages 6-7, *infra*.

[2] SMCRC performs rate bureau functions with respect to intrastate motor common carrier rates for the transportation of general commodities within the States of Georgia, Mississippi, North Carolina and Tennessee (R. 81, 129). ("R." refers to the record in the district court. Where the reference is to the entire docket item, the page number given refers to the first page of the item.) There is a separate rate committee for each state (R. 1279). NCMCA performs the same functions in North Carolina (R. 68, 130). There is cooperation and coordination between the two rate bureaus in North Carolina (Pet. App. 8a).

SMCRC also acts as a rate bureau for interstate rates under agreements approved by the Interstate Commerce Commission (see 49 U.S.C. 10706(b)). R. 40, 82-83. The ICC's jurisdiction over motor common carrier transportation services and

The bureaus also perform other functions; they publish tariffs and supplements containing the rates agreed upon, and they provide counsel, staff experts and facilities for the preparation of cost studies and other types of exhibits and testimony for use in support of proposed rates at state regulatory commission hearings. Pet. App. 64a.

In November 1976, the United States filed a complaint against petitioners in the United States District Court for the Northern District of Georgia pursuant to Section 4 of the Sherman Act, 15 U.S.C. 4, alleging that petitioners' collective ratemaking operations constituted price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and seeking an injunction against the collective ratemaking practices. J.A. 1-14. Specifically, the complaint charged that the rate bureaus and their members were engaged in a conspiracy "[b]eginning sometime in the early 1940's * * * and continuing to the date of this Complaint" (J.A. 9), to "fix * * * rates charged for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee" (J.A. 10). No state agencies or state officials were named as defendants and the government did not seek to enjoin any state regulatory functions.[3]

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rates is limited to interstate transportation, that is, movement across state lines (49 U.S.C. 10521). Interstate rate practices are not at issue in this case.

[3] The district court allowed petitioner National Association of Regulatory Utility Commissioners (NARUC) to intervene as a defendant to represent the general interests of the regulatory commissions of the five subject states. In addition, the attorneys general of the five states were invited to participate

In March 1979, the district court granted the motion of the United States for summary judgment (Pet. App. 1a-30a). The district court rejected petitioners' contention that the activities of the rate bureaus were immune from the antitrust laws under the "state action" doctrine articulated by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943). Pet. App. 11a-24a. The court acknowledged that motor common carriers operating within the five states in which these rate bureaus engaged in collective ratemaking are subject to regulation by state commissions. The carriers are required by law to obtain certificates of public convenience and necessity from the regulatory commission of the state within which they operate, and the carriers' rates are subject to state approval. All five states follow a similar pattern in regulating motor carrier rates: carriers must file their intrastate rates and proposed rate changes with the appropriate state commission; proposed rates take effect unless the commission sets them for hearing; if a hearing is ordered, then the rates take effect only after they are approved or modified by the commission. See Pet. App. 3a-9a, 64a n.1.

The district court held, however, that under this Court's decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), state action immunity does not extend to private conduct unless it is compelled by the state. Pet. App. 15a-21a. The court found that none of the states requires collective ratemaking by intrastate motor carriers; carriers' rate proposals need not "be formulated or published by

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as amici curiae, which they did in the district court. Only North Carolina continued to participate in the court of appeals and in this Court. See Pet. App. 32a n.2.

rate conferences" (*id.* at 11a). Indeed, the district court noted, "it is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states" (*id.* at 21a).[4] Because "the practice [of fixing rates by private agreement] is nowhere compelled" (*ibid.*), the district court concluded that the restraint on competition resulting from the rate bureaus' collusive setting of proposed rates is attributable to private conduct rather than state action and therefore is not immune from the antitrust laws.

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[4] At the time this suit was filed, there was no mention of rate bureaus or rate agreements among intrastate carriers in any statute in any of the five states, although the state regulatory commissions apparently acquiesced in the practice. In 1977, North Carolina enacted a statute permitting certain state-approved collective ratemaking procedures. The North Carolina statute provides that any carrier subject to the state commission's jurisdiction may submit "an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges" to the state public utility commission for approval and provides that agreements so approved are exempt from the state's antitrust laws. N.C. Gen. Stat. § 62-152.1(b) (1982). No such agreements are required to be submitted, and no agreement is to be approved unless the commission "finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure." *Id.* § 62.152.1(e).

The Georgia and Tennessee statutes have been amended since the district court's decision and now include provisions referring to collective ratemaking. See Tenn. Code Ann. § 65-15-119 (1983); Ga. Code Ann. § 46-7-18 (1982). Petitioners do not argue that these revised statutes compel collective ratemaking. Neither Alabama nor Mississippi currently has any statute dealing with rate bureaus.

The district court also rejected (Pet. App. 24a-26a) petitioners' contention that their conduct was immunized by the *Noerr-Pennington* doctrine, which immunizes private concerted action aimed at influencing public officials to take potentially anticompetitive action.[5] The court reasoned that the conduct at issue "surpasses mere petitioning and renders the industry in part, a decisionmaker" (Pet. App. 26a).

After rejecting petitioners' defenses to the government's Sherman Act claim, the district court held that the collective intrastate rate agreements among petitioners' member carriers constituted per se violations of Section 1 of the Sherman Act. Pet. App. 26a-29a. In reaching this conclusion, the court rejected, on the basis of *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), the argument that petitioners only proposed—and the state commissions actually fixed—intrastate trucking rates. The court ruled that petitioners' conduct "easily fits the classic description of a 'naked price restraint'" (Pet. App. 28a). The court concluded that petitioners, by displacing competition with concerted pricing decisions within the "zone of reasonableness" allowed by the state regulatory agencies, had plainly violated the Sherman Act "at its most sensitive spot" (*ibid.*).

The court enjoined the rate bureaus from entering into or maintaining any conspiracy to fix collective intrastate rates[6] or providing a forum for any

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[5] See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). See also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

[6] The decree expressly does not prohibit carriers who are parties to a joint rate—"a single rate applied jointly by two

discussion of collective rates. J.A. 96-97. The final judgment, however, expressly permits the rate bureaus to continue to act as agents for intrastate carriers by publishing, in a single tariff if desired, rates independently arrived at by each competing carrier. J.A. 98. In addition, each rate bureau is permitted to provide statistical data and advice—including justifications for an individual carrier's rates filed with a state agency—to any carrier wishing to avail itself of the rate bureaus' expertise in the compilation and publication of tariffs. J.A. 99.

2. First a panel of the court of appeals (Pet. App. 31a-60a) and then the court of appeals sitting en banc affirmed (*id.* at 63a-93a). The court of appeals rejected petitioners' contentions that their conduct was immune from the antitrust laws under the state action doctrine. The court reasoned that *Parker* v. *Brown*, *supra*, "established the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign" (Pet. App. 66a). The anticompetitive action of a private party is fairly attributable to the state only if the activity is required or compelled by the state acting as sovereign. *Id.* at 66a-69a. The court explained (*id.* at 69a; footnote omitted):

> [W]hen a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state.

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carriers to cover a shipment in which one carrier operates over only part of the route and the other carrier serves the remaining distance to the destination" (Pet. App. 42a n.11)—from agreeing on that rate.

On the other hand, if a state has not compelled private parties to engage in anticompetitive conduct, but rather has afforded those parties the option of competing or colluding, then their anticompetitive conduct is the product of private volition and thus it is not exempt as state action from federal antitrust laws (*id. at* 69a-70a).

The court of appeals found that this distinction is consistent with the federalism concerns that served as the basis for *Parker* v. *Brown*, *supra*. When "a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time" (Pet. App. 70a n.9). Finally, the court pointed out that this Court has consistently ruled that "state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity" and that there is no significant distinction between such state activity and the situation presented here in which "a state grants private parties the option of participating in a scheme of state supervision" (*id.* at 77a). Applying the compulsion standard, the court of appeals "ha[d] little difficulty in holding that the activities of appellants are not immune from Sherman Act coverage * * * because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively" (*id.* at 71a).[7]

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[7] Emphasizing that its holding applied only to the conduct of private parties, the court noted that under *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), and *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), compulsion is not required when public

The court of appeals also rejected petitioners' contention that the *Noerr-Pennington* doctrine immunized their collective ratemaking agreements. The court endorsed the district court's explanation that the " 'coordinating and fixing of rates' " is a prohibited anticompetitive activity quite distinct from " 'presenting the collectively set rates to the state commissions' "; only the latter activity is arguably protected by the *Noerr-Pennington* doctrine. Pet. App. 43a-45a, quoting *id.* at 25a; see *id.* at 80a.

Finally, the court of appeals affirmed the district court's holdings that petitioners had violated the Sherman Act and that the Interstate Commerce Act created no implied immunity for petitioners' conduct. See *id.* at 40a, 45a-51a, 80a & n.20.[8]

SUMMARY OF ARGUMENT

I.

The state action doctrine in antitrust law that this Court articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases rests on dual principles

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defendants, rather than private parties, seek to invoke the state action exemption. Rather, if a subordinate unit of government is carrying out a clearly articulated state policy, that governmental unit is acting as the agent of the state and the state action defense is available to it. Pet. App. 70a-71a.

[8] Four judges dissented. Judge Hill, in the principal dissent, acknowledged that the majority's "conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible." Pet. App. 81a. But he argued that language in this Court's opinion in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), required the court to extend state action immunity to any private party acting consistently with a clearly articulated state policy the implementation of which is actively supervised by the state. Pet. App. 81a, 83a.

of federalism: the Sherman Act's proscription of anticompetitive conduct is the supreme law of the land, but Congress could not have intended through its silence in the Sherman Act to prohibit action of a state that may restrain competition. Thus, the *Parker* immunity, like all implied exemptions to the antitrust laws, has always been strictly limited. The Court pointed out in *Parker* itself that nothing in the Sherman Act indicated that states had any power to immunize private conduct from the federal antitrust laws simply by encouraging or approving it. 317 U.S. at 351. Petitioners' contention that the rate bureaus' actions nevertheless should be immunized because they further an articulated policy of the states and are supervised by the states' regulatory commissions is flatly inconsistent with clear holdings of this Court, and distorts the federalism principles that support the state action doctrine.

A.

Recognizing the limitation of the *Parker* doctrine to restraints attributable to governmental action by the states rather than private action, this Court has twice expressly rejected similar claims by private parties that mere state approval or encouragement of their conduct should immunize them from the Sherman Act. In both cases, the Court, without dissent on the issue, required that at a minimum the private defendants must demonstrate that their anticompetitive actions were compelled by the state. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

B.

The compulsion requirement faithfully serves the federalism principles underlying the state action doc-

trine. It recognizes that in particular instances the state may compel private persons to act anticompetitively, pursuant to a state policy to displace competition with regulation, and thereby make the private conduct fairly attributable to the state. The compulsion requirement also assures that federal law, which strongly favors competition, gives way to state regulation only when there is a real conflict with state law. If the state leaves the decision whether to compete to the private parties, then they can comply with both state and federal law and accordingly they must comply with the Sherman Act. *Cantor* v. *Detroit Edison Co.*, *supra*. To hold otherwise would be fundamentally inconsistent with this Court's holdings that implied exemptions to the antitrust laws are to be construed narrowly and are permitted only to the minimum extent necessary.

C.

Although this Court's state action decisions and the federalism policy that underlies them unquestionably support the holdings below that petitioners' volitional price-fixing agreements are not immune from the Sherman Act, petitioners nevertheless assert that the Court more recently has modified those holdings and principles sub silentio in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). But in *Midcal*, this Court relied upon *Goldfarb* and *Cantor* in invalidating a state statute that required resale price maintenance, but did not make any provision for the state to prescribe or even review the prices set by private parties. Thus, the Court's analysis gave no indication that it intended to depart from its prior holdings. There is similarly no inconsistency between the requirement of state com-

pulsion as a prerequisite for immunizing private conduct and the principle established by this Court in *Lafayette* and *Boulder* that municipalities, which themselves engage in governmental conduct, are entitled to immunity in the exercise of discretionary authority delegated to them by the states to implement clearly articulated state policies.

D.

Petitioners also argue that the compulsion requirement should be rejected because it unduly confines the states' discretion to achieve their regulatory objectives. But this contention amounts to nothing more than asking this Court to disregard the appropriate limits of the state action doctrine and the Supremacy Clause. *Parker* v. *Brown*, *supra*, and its progeny protect state action, not state policy. States retain the power to displace competition among motor carriers only if the states compel the carriers to set rates collectively. Otherwise, petitioners' private price-fixing is properly subject to federal law embodied in the Sherman Act.

E.

The express immunity afforded to certain types of interstate rate agreements by the Interstate Commerce Act—an immunity which has been largely eliminated and carefully circumscribed by recent legislation—does not support petitioners' argument that intrastate rate agreements constitute state action or are otherwise immune from the antitrust laws. Cf. *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378 (1981).

II.

Petitioners' collective ratemaking is not immunized by the *Noerr-Pennington* doctrine. The *Noerr* doctrine reflects this Court's conclusion that Congress did not intend the antitrust laws to apply to attempts by private parties to obtain governmental action that might restrain competition. But the action at issue in this case is not an attempt by the motor carriers to obtain a *governmental* restraint. Rather, it is private price-fixing that directly restrains competition. Merely because the collectively agreed-upon rates must be submitted to state regulatory officials for review and approval under a reasonableness standard before they can go into effect does not immunize petitioners' antecedent naked price restraint. See *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

ARGUMENT

I. COLLECTIVE RATEMAKING BY PRIVATE PERSONS THAT IS NOT COMPELLED BY THE STATE IS NOT "STATE ACTION" AND THEREFORE IS NOT EXEMPT FROM THE SHERMAN ACT

Section 1 of the Sherman Act was intended to prohibit broadly private restraints on competition (21 Cong. Rec. 2456, 2461 (1890) (remarks of Sen. Sherman)) and it is well-settled that the Act strongly condemns the type of naked price restraint embodied in the collective ratemaking process practiced by rate bureaus. See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 214 (1940); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 458 (1945). Petitioners do not, nor could they, argue that there is any express exemption in the Sherman Act or elsewhere that immunizes their private efforts to set prices collectively on intrastate transpor-

tation. Instead, they argue that the injunction against their price-fixing activities should be set aside because their private agreements concerning what rates to propose collectively should be considered "state action" within the meaning of this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943). They claim that because the states authorize the filing of collective rates and review those rates for their reasonableness, the collective rates agreements themselves are entitled to state action immunity. This contention finds no support in any decision of this Court, would extend the state action immunity much further than is necessary to protect those interests of the states that justify the immunity, and is not supported by any other policies that can be served consistently with the Sherman Act.

A. This Court Consistently Has Held That Private Persons Engage In State Action Only If Their Conduct Is Compelled By The State

In *Parker* v. *Brown*, 317 U.S. at 351, the Court held that Congress did not intend to prohibit "state action or official action directed by a state." See *Hoover* v. *Ronwin*, No. 82-1474 (May 14, 1984), slip op. 14 n.24. Although nothing in the Sherman Act itself or its history expressly indicates that states are exempt from its prohibitions, the Court observed that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. Thus, the Court made plain that the "state action" doctrine rests entirely on principles of federalism. Based on those principles, the Court held that

the state-adopted and state-enforced raisin marketing program at issue in that case could not be enjoined as a violation of the Sherman Act because the program was "an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352. See *Olsen* v. *Smith*, 195 U.S. 332, 344-345 (1904).

But even as it recognized this immunity for the states, the Court in *Parker* was careful to emphasize that concomitant principles of federalism limit the scope of the immunity to restraints imposed by the states and their agents. The states do not have the power to shield privately imposed restraints of trade from the Sherman Act: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351. See *Northern Securities Co.* v. *United States*, 193 U.S. 197, 346 (1904); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976).

In none of the cases since *Parker* v. *Brown*, *supra*, in which this Court has applied the state action doctrine has the Court held or even suggested that discretionary conduct by private persons could be deemed state action for Sherman Act purposes. To the contrary, in the only two cases in which the Court directly considered whether private conduct should be immunized because of state involvement, the Court held that the absence of compulsion by the state was fatal to the parties' claim that their private activity should be deemed action by the sovereign.[9]

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[9] An analogous, although not identical, "state action" issue arises under the Fourteenth Amendment. In that context, this Court has held that "a State is responsible for the * * * act of

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975) (emphasis added), the Court unanimously held that when a private party seeks to invoke the state action exemption, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity *is required by the State* acting as sovereign." Because the State of Virginia did not require a minimum fee schedule for attorneys, the Court held that the promulgation and use of such a fee schedule by associations of private attorneys was not immune from challenge under the antitrust laws. *Id.* at 790-792. The Court explicitly rejected the defendants' argument that they could invoke the state action exemption because their activities "complemented the objective" of the state or were "prompted" by state action. The Court firmly stated that this was "not enough." *Id.* at 791.

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a private party when the State, by its law, has *compelled* the act." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 170 (1970) (emphasis added). There too the Court has refused to hold "that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164 (1978). Indeed, even active involvement by the states—"approval by a state utility commission"—has not been deemed sufficient to convert private action into state action "where the commission has not put its own weight on the side of the proposed practice *by ordering it* * * *." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (emphasis added). See *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982); *Rendall-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). State action under the Sherman Act is an even narrower concept than state action under the Fourteenth Amendment because this Court has repeatedly held that exceptions to the Sherman Act, particularly implied exemptions, must be narrowly confined. See pages 19-20, *infra*.

"[A]nticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity. *Ibid.* (emphasis added).

In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), a case that is similar to this one, the Court reiterated this holding. *Id.* at 593 n.28. In *Cantor*, the Court held that an electric utility's program of tying the purchase of light bulbs to the purchase of electricity was not protected state action even though the state public utility commission authorized the practice and approved it as part of the utility's rates. Each of the opinions in *Cantor* specifically noted, and endorsed, the "carefully drafted language in the *Goldfarb* opinion" (*id.* at 624 (Stewart, J.)), holding that a private party's anticompetitive conduct does not fall within the state action exemption unless the state compels it. See *id.* at 600 & n.41 (plurality opinion); *id.* at 604 (Burger, C.J., concurring); *id.* at 609 (Blackmun, J., concurring); *id.* at 623-626 (Stewart, J., dissenting). Anything short of compulsion, the Court explained, is not sufficient to warrant applying the state action exemption to private conduct: "[t]he Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.* at 592-593 (footnotes omitted). A private party is not entitled to state action immunity from the antitrust laws, the Court held, if "notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593. Since the private utility defendant in *Cantor*—and not the state—made the decision

to institute the challenged conduct, this Court held that the privately imposed restraint at issue was not shielded by the state action exemption. *Id.* at 592-598. The Court specifically held that approval by the state's regulatory agency of the challenged conduct as part of its review of the utility's rates did not suffice to bring that conduct within the state action immunity. *Id.* at 594.[16]

B. Requiring Compulsion By The State To Convert Purely Private Action Into State Action Properly Reflects The Federalism Interest Embodied In The State Action Doctrine

1. The compulsion requirement for converting purely private action into exempt state action follows directly from the federalism rationale of the exemption articulated in *Parker* v. *Brown*, *supra*. Because the Sherman Act was intended broadly to prohibit restraints of trade imposed by "individuals and corporations," *Parker*, 317 U.S. at 351, private conduct should be protected from the pro-competitive policies of the Sherman Act if, and only if, "the challenged acts could be attributed to the state as sovereign" (Pet. App. 66a). In the situation where a private restraint is compelled by the state, the private party's action is fairly viewed as mere obedience to the *state's* decision to displace competition. But where,

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[16] This Court has further held that state compulsion of private anticompetitive conduct is not itself valid under the Supremacy Clause, unless it is part of a regulatory program under which the state directly supervises private conduct. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Otherwise, the states would be enabled simply to countermand the requirements of the Sherman Act at will, and thereby effectuate pro tanto repeals of the federal statute.

as here, private conduct is not compelled by the state —if it is merely allowed—the state has not made the decision to displace competition; it has left it to private parties to decide whether or not they will conform their conduct to the federal antitrust laws. Since, in such situations, the regulated private persons can comply with both the federal antitrust laws and state regulatory laws, there is no real conflict between state and federal law and applying federal antitrust law cannot frustrate the implementation of the state regulatory scheme. See *Cantor*, 428 U.S. at 595. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 463 (1969).

The same conclusion follows from application to the private conduct at issue of the principle, often reiterated by this Court, that implied exemptions to the antitrust laws are disfavored and must be narrowly confined to the minimum necessary to make a particular statutory program work. See *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981), and cases there cited. The Court held in *Cantor*, 428 U.S. at 597, that this principle fully applies to claims of exemption based on state regulation, since the standards for exemption to be applied to state regulation "surely must be at least as severe as those applied to federal regulatory legislation." The scope of the implied antitrust exemption for private conduct that follows from *Parker*, therefore, is limited by the purpose of the *Parker* doctrine itself, which is to enable the states to displace competition with programs of governmental regulation. Accordingly, exemption is warranted when the state regulatory program *requires* private persons' conduct to deviate from Sherman Act

norms.[11] But where the state program merely gives private persons an option to engage in behavior inconsistent with the Sherman Act, noncompliance with those norms cannot be said to be necessary to make the state regulatory program work, since the state program can be satisfied by private conduct within those norms. Hence, private conduct that is discretionary under the state program cannot satisfy the established standard for an implied antitrust exemption.[12]

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[11] Under the Supremacy Clause, of course, the states are not empowered to enact express exemptions to the Sherman Act. Consequently, no matter how explicitly the state authorizes, or even commands, private conduct inconsistent with Sherman Act norms, the question whether the resulting private conduct violates the federal statute remains a question of implied exemption. Thus, there could be no applicability here of the view urged in dissent in *Boulder* that the validity of the municipal conduct there at issue should have been judged under preemption rather than exemption standards. See 455 U.S. at 61-69 (Rehnquist, J., dissenting). Similarly, the question whether there is an implied exemption from damages liability for private conduct compelled by the state is distinct from the question whether the state law compelling that conduct is preempted. See *Midcal*, 445 U.S. at 114 n.16.

[12] This conclusion comports as well with the general proposition, reflected in this Court's Tenth Amendment decisions, that it is not the proper role of the states in our federal system to confer on private persons options that are denied them by federal law, and thus to countermand Congress's exercise of its legislative authority to regulate the conduct of persons directly. Hence, the *Parker* doctrine resembles this Court's description in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286 (1981), of its Tenth Amendment jurisprudence as reflecting a

> sharp distinction between congressional regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the Nation and of

2. Applying these principles to this case clearly requires affirmance of the decision of the court of appeals. Petitioners do not contend that any state compelled the challenged anticompetitive price agreements; they concede (SMCRC Br. 5) that the states give carriers the option of engaging in such conduct or of setting their rates independently. Thus, the decision in favor of what amounts to private price fixing was not made by the states in the exercise of their sovereign powers; it was made by the carriers, and the fact that a state authorized and approved that choice is, as the Court has repeatedly emphasized, not sufficient to confer state action immunity.[13] Within the state regulatory regime, motor carriers can engage in either collusive conduct—rate agreements like those challenged here—or competitive conduct—the submission of individual tariffs. In this area, state law has given carriers the option to choose between competition and collusion. This is precisely what state law does in areas it leaves unregulated.

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the State in which they reside," [*National League of Cities* v. *Usery*, 426 U.S. 833, 845 (1976)], and federal regulation "directed, not to private citizens, but to the States as States," *ibid.*

[13] Petitioners are incorrect in insisting (see SMCRC Br. 35; NCMCA Br. 16-17) that the relationship between the private parties and the state in this case resembles that in *Parker*. In *Parker*, the state decided to impose an anticompetitive regime; that it made this decision at the behest of private parties was not considered material. Here, the state regulatory regimes permit carriers to propose rates in either a competitive or a collusive fashion, and the carriers chose to collude. Collusion was not imposed on them by the states. See Pet. App. 67a-68a n.6. Hence, the very distinction drawn by this Court in *Cantor* (428 U.S. at 594 n.32) between that case and *Parker* applies equally here.

And when the state gives regulated private parties the choice between competition and collusion, just as when it leaves them unregulated, the Sherman Act requires private parties to choose competition.[14]

C. The Compulsion Requirement For Private Conduct Adopted In *Goldfarb* And *Cantor* Was Not Altered In *Midcal* And Is Fully Consistent With The "State Contemplation" Standard Applied To Municipalities In *City of Boulder* And *City of Lafayette*

1. Petitioners acknowledge (SMCRC Br. 14-16; NCMCA 17) that this Court in *Goldfarb* and *Cantor* expressly held that private action is protected state action only when the state compels it. Nevertheless, they contend that these holdings were subsequently modified by the Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Midcal was a suit seeking to enjoin enforcement of a state statute that mandated resale price maintenance by private liquor wholesalers. Although private conduct was not challenged in *Midcal*, state compulsion was in fact clearly present in *Midcal* as to the private parties who were required to comply with

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[14] Both courts below concluded that, in the absence of state action immunity, the rate agreements are price-fixing agreements that are per se violations of Section 1 of the Sherman Act. See pages 6, 9, *supra*. Although petitioner SMCRC appears now to suggest (SMCRC Br. 12 n.25) that a rule of reason analysis is required if the agreements are not immune, that question was not presented in the petition for certiorari and accordingly is not before this Court. To the extent petitioners' argument that their agreements must be judged under the rule of reason is based on the information gathering and tariff publication functions performed by the rate bureaus, we emphasize that only the agreements on rates were challenged and enjoined in this case.

the statute.[15] In that context, the Court's statement that a state-imposed restraint on competition falls within the state action exemption only if it is " 'clearly articulated and affirmatively expressed as state policy' [and] * * * the policy [is] * * * 'actively supervised' by the State itself," *id.* at 105, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (Brennan, J.), indicated no change in the standard for determining whether private conduct is shielded by the state action defense.[16] The Court held only that the state failed adequately to supervise the prices set by private entities, and, therefore, did not " 'displace unfettered business freedom' with its own power," 445 U.S. at 106 n.9, quoting *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). Accordingly, the state statutory scheme in question was invalid.[17]

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[15] See *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982) (*Midcal* involved a "statute [that facially] conflicted with the Sherman Act because it *mandated* resale price maintenance" (emphasis in original)).

[16] In *Boulder*, 455 U.S. at 51 n.14, the Court specifically noted that the "clearly articulated policy" standard of *Midcal* and *Lafayette* applied to "anticompetitive restraints engaged in by state municipalities or subdivisions," while reserving the question whether a municipal ordinance such as the one at issue in *Boulder* "must * * * satisfy the 'active state supervision' test focused upon in *Midcal*."

[17] Petitioners emphasize (SMCRC Br. 19) this Court's characterization of the conduct at issue in *Midcal* as " 'essentially a private price fixing arrangement.' " The essentially private nature of the restraint resulted not from any absence of compulsion to engage in price fixing but, instead, from the state's failure to supervise the private parties, who retained the discretion to set the prices. Thus, the Court underscored the importance to the state action doctrine of assuring that the state or its agents, and not private parties, exercise complete control over any restraint on competition.

Nothing in this Court's *Midcal* opinion even hints that the Court was involved in a reassessment of the standards in *Goldfarb* or *Cantor*. To the contrary, the Court in *Midcal* specifically quoted from and relied upon those decisions. Quoting *Goldfarb*, 421 U.S. at 791, the Court emphasized that "[i]t is not enough that * * * anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 445 U.S. at 104.[18] Moreover, the court of appeals' response to this contention is surely correct; "reading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*," and nothing in the Court's opinion in *Midcal* suggested that the Court intended to do any such thing. There is thus simply no basis for concluding that the compulsion standard unanimously endorsed by the Court in *Goldfarb* and *Cantor* was overruled sub silentio in a case decided four years later, on a different ground.[19]

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[18] The Court in *Midcal* also expressly relied on *Goldfarb* and *Cantor*, among other decisions, as "establish[ing]" the appropriate standard (445 U.S. at 105). Thus, both the holding and the language of *Midcal* merely apply, and are entirely consistent with, the principle this Court had previously established: "[A] state law [that] goes so far as to require, rather than simply authorize, the [private] anticompetitive conduct in question" is "a prerequisite to antitrust immunity * * * but it cannot alone be sufficient." *Cantor*, 428 U.S. at 609 (Blackmun, J., concurring). See also note 10, *supra*.

[19] Petitioner SMCRC argues (Br. 23) that the Court last Term in *Hoover* v. *Ronwin*, No. 82-1474 (May 14, 1984), held that private conduct can be state action if the private person acts pursuant to state policy and the action is supervised by the state. But *Hoover* involved conduct of the state supreme court

2. This Court has made plain that the "clearly articulated state policy to displace competition" standard applies, as a standard distinct from "compulsion," only to conduct of municipalities and other state instrumentalities.[20] See *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra*; and *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51 (1982). The Court's holdings reflect the special status of these governmental units in our federal system and thus have no application to this case, which concerns only private conduct. (We discuss this issue in our brief amicus curiae filed in *Town of Hallie* v. *City of Eau Claire*, No. 82-1832. A copy of that brief is being served on petitioners.)

Although subordinate units of state government are not themselves "the State as sovereign," and "for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign," *City of Lafayette*, 435 U.S. at 410 (Brennan, J.); *City of Boulder*, 455 U.S. at 53-54, cities do engage in governmental action and are for many purposes the state's representatives.

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and its committee on examinations and admissions, rather than private conduct. Moreover, the Court in *Hoover* held that the challenged action was that of the state supreme court, which is clearly state action, and therefore it expressly stated that it "need not address the issues of 'clear articulation' and 'active supervision'" (slip op. 9). Thus, nothing in *Hoover* casts any doubt on the Court's earlier holdings in *Goldfarb* and *Cantor* that only compelled private action can be state action.

[20] To the extent the "clearly articulated policy" and "compulsion" standards have been used with reference to private conduct, they have been used interchangeably or tend to meld because, as we have shown, discretionary private conduct cannot qualify for *Parker* immunity.

When a state decides to displace competition with a system of regulation designed to protect the public welfare, the legislature often, for practical reasons, must delegate authority to subordinate agencies to carry out state policy. Moreover, effective implementation of state policy often requires the states to give subordinate governmental units some discretion in implementing state policies that have been expressed in relatively general terms or that depend on the agency's expert analyses of particular circumstances. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 413 (plurality opinion); *Community Communications Co.* v. *City of Boulder*, 455 U.S. at 51.

If the authority granted indicates that the legislature contemplated the conduct at issue, then it can be presumed that the legislature has determined that an exercise of the agency's discretion to take that action will further the interests of the state as a whole. Accordingly, subordinate agency action within the range contemplated by the legislature is official action implementing the state's policy. Subjecting discretionary state agency conduct contemplated by the state to the Sherman Act could seriously interfere with the state's ability " 'to allocate governmental power between itself and its political subdivisions' " (*Boulder*, 455 U.S. at 57, quoting *Lafayette*, 435 U.S. at 416) and thereby frustrate implementation of state policy.

In contrast to municipalities and other state agencies, private parties are not officers or agents of a state and by definition do not engage in governmental action.[21] Therefore, if a state purports to carry

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[21] This Court often has explicitly recognized the significance for purposes of the state action doctrine of the distinction

out state policy by delegating discretionary authority to private parties, it is not acting through its "agents" or "representatives," as petitioners contend. Rather, it has abdicated its right to displace competition with state governmental control. Application of the Sherman Act to private parties whose conduct is authorized but not compelled by the state thus does not "nullify a state's control over its officers and agents." *Parker*, 317 U.S. at 351. Rather it is required to implement Congress's intent that the Sherman Act be applied "to suppress combinations to restrain competition * * * by individuals and corporations." *Ibid.*[22]

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drawn in *Parker* between private parties and officers or agents of a state. See, *e.g.*, *Cantor*, 428 U.S. at 601 (Stevens, J.) ("*Parker* concerned only the legality of the conduct of the state officials"); *Bates*, 433 U.S. at 361 ("*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency rather than against a private party"); *Lafayette*, 435 U.S. at 411 n.40 (Brennan, J.) ("*Cantor*'s analysis is not, however, necessarily applicable" to restraints imposed by a "State's subdivisions" because *Cantor* involved "anticompetitive activity in which purely private parties engaged.").

Similarly, in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109-110 (1978), the Court held that the discretionary exercise of delegated authority by a subordinate state agency is not subject to the Sherman Act. But the Court expressly distinguished such action by the state's agents from private restraints authorized by the state such as that held to violate the Sherman Act in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

[22] Amicus Edison Electric Company argues (Br. 13) that the standards applied to municipalities should be extended to private persons in order to avoid creating "a serious competitive imbalance between municipal and private competitors." This contention disregards the whole point of the state action

D. Petitioners' Policy Arguments Do Not Justify Expanding The State Action Immunity

There is no reason for this Court to reconsider the compulsion requirement it adopted in *Goldfarb* and *Cantor* for private action. Petitioners' suggestion that, as a matter of public policy, the Sherman Act should not apply to the collective rate agreements at issue in this case, which the states have approved and perhaps even encouraged, does not, we submit, warrant expansion of the state action exemption. If the states conclude, as petitioners contend (SMCRC Br. 5), that motor carrier rate agreements are essential to the states' regulatory systems, the states may compel and supervise such agreements. If the states conclude that such agreements are sometimes, but not always, essential to implementation of state policy, they may compel and supervise such agreements only in particular circumstances that the states clearly designate or for particular categories of carriers. If the states, however, continue to choose not to compel motor carriers to act in a particular way, then the carriers' action will simply remain private action, not that of the states, and no substantial federalism interest will be implicated by the Sherman Act's application to petitioners' private price-fixing.

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doctrine. The states retain the right to displace competition as the basis for certain commercial activities when a state acts through its legislature or subordinate state agencies. If the test adopted in *City of Boulder* is satisfied, the state has displaced competition to that extent and thus has exercised its right to place private persons at a "competitive" disadvantage. But the state cannot, consistently with the Sherman Act, confer a similar discretionary authority on private persons to act in an anticompetitive manner inconsistent with Sherman Act norms.

Petitioners assert (NARUC Br. 9 n.12; NCMCA Br. 15) that requiring a state to compel anticompetitive private conduct in order to immunize it would be undesirable because such a rule could result in less competition, since some carriers now file individual rates. This argument ignores, however, the dual principles of federalism on which the state action doctrine rests: (i) supremacy of the federal antitrust laws as applied to privately imposed restraints, and (ii) latitude for the actions of the state and its agents. As the court of appeals explained, "it is the source of the decision to compete—not the extent of competition—which determines whether state action exists" (Pet. App. 79a). Congress did not intend to prohibit states' decisions to displace competition by their own actions, but it did intend to prohibit displacement of competition by private persons.

To the extent petitioners' arguments for state action immunity rest on the contention that efficiencies may result from collective activity other than agreements on single line rates, they are irrelevant.[23] The district court's final judgment prohibits the continuation of the defendant rate bureaus' ratefixing conspiracy, but it permits the rate bureaus to publish joint tariffs containing motor common carrier rates independently arrived at by each carrier (J.A. 93-102). In addition, the decree permits the rate bu-

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[23] As we noted previously, the district court expressly excluded the practice of setting joint rates on a single movement by more than one carrier (interlining) from the injunction. Unlike the horizontal rate agreements at issue here, interlining is a form of joint venture. Accordingly, the assertion by Amicus American Trucking Associations, Inc. (Br. 4) that the decision below will interfere with interlining is manifestly incorrect.

reaus to serve as rate experts for any carrier desiring their services to support an independent rate proposal before the appropriate regulatory agency.[24] In this manner the carriers—small as well as large—and state regulatory agencies[25] still may enjoy any benefits accruing from a single tariff publication and petitioners' statistical and analytical skills.

Alternatively, if petitioners are arguing that competition is undesirable because it is too difficult for carriers to decide on their prices individually or because less efficient carriers may be forced out of business, those arguments repeatedly have been rejected by the Court as contrary to the congressional policy of competition embodied in the Sherman Act. *E.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-222 (1940). Indeed, they have largely been rejected with respect to rate bureaus themselves by Congress in the Motor Carrier Act of 1980. See pages 32-33, *infra*.

E. The Interstate Commerce Act Does Not Immunize Petitioners' Private Price Fixing Agreements

Petitioner NCMCA also contends as part of its state action submission (NCMCA Br. 13-16) that the Sherman Act should not be applied to state-regulated

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[24] A similar arrangement already has been adopted and successfully implemented in *United States* v. *Motor Carriers Tariff Bureau, Inc.*, Civ. Action No. 77-1973, Trade Cas. (CCH) ¶ 62,374 (D.D.C. Oct. 24, 1978) (R. 1476-1480; R. 2011-2015).

[25] The final judgment is directed solely at the rate bureaus' private activities and does not in any way prevent the state regulatory agencies from exercising the powers conferred on them by state law.

intrastate carriers' collective ratemaking because the Interstate Commerce Act provides an express and limited exemption for collective *interstate* ratemaking and authorizes the states to review certain intrastate rates. The courts below correctly held (Pet. App. 40a n.9, 80a n.20) that the Interstate Commerce Act creates no exemption, express or implied, for collective intrastate ratemaking, and it does not authorize the states to confer such immunity.[26]

Petitioners point to nothing in the Interstate Commerce Act suggesting that such an immunity exists, and indeed they do not directly challenge the lower courts' holding on this issue. They contend only that the state action doctrine should protect state-regulated intrastate conduct comparable to interstate conduct for which Congress has provided an express, albeit carefully tailored, antitrust exemption.

In the first place, the state action doctrine does not confer immunity on private conduct merely because Congress has expressly exempted analogous, but different, conduct. It is for Congress alone to decide what private conduct should be immune from the Sherman Act. The differences in the antitrust immunity available for interstate and intrastate ratemaking are simply the result of choices made by Congress, and the wisdom of those choices has no bearing on the issues presented for review in this case. Certainly, it provides a wholly inadequate basis for inferring an exception to the Sherman Act. See, *e.g.*, *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-

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[26] By contrast, the McCarran-Ferguson Act provides an express antitrust immunity for the "business of insurance" to the extent regulated by state law. 15 U.S.C. 1012.

720 (1975); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

Moreover, the restrictions imposed by federal law on collective interstate ratemaking by rate bureaus are much more exacting than state regulation of intrastate practices and serve the same basic purpose as the district court's injunction. As of July 1, 1984, the Interstate Commerce Commission, with certain limited exceptions, may not confer antitrust immunity on any agreements among motor carriers that provide for discussion or voting by carriers on single line rates. 49 U.S.C. 10706(b)(3)(D).[27] In considering the 1980 Act, Congress explained that one of its primary aims was to develop "a legislative solution aimed at increasing competition" (H.R. Rep. 96-1069, 96th Cong., 2d Sess. 3 (1980)). The activities of rate bureaus constitute an extraordinary exception to

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[27] Under the Motor Carrier Act, motor carrier rate bureaus must comply with numerous statutory restrictions if they wish to maintain their antitrust immunity, and the ICC can void ab initio any tariff filed that is the product of a significant violation of the rate bureau's allowed procedures. *ICC* v. *American Trucking Ass'n*, No. 82-1643 (Jan. 5, 1984). Among other things, the statute requires disclosure of membership (49 U.S.C. 10706(b)(3)(A)); imposes limits on discussions of and actions on proposed rates (49 U.S.C. 10706(b)(3)(B)); guarantees the rights of bureau members to act independently (*ibid.*); and requires timely action on proposed rates (49 U.S.C. 10706(b)(3)(B)(vii)). More specifically, the Act restricts voting on collective proposals to those carriers that have authority to participate in the transportation to which the proposal applies; bars bureau protests of any motor carrier rate proposed by an individual carrier; limits discussion of general rate increases to industry average costs; imposes strict limits on bureau handling of independent action proposals; and requires completely open bureau meetings. 49 U.S.C. 10706(b)(3)(D).

the usual rules absolutely condemning collusive activities to set prices; the specific purpose of Section 14 (94 Stat. 803), was to limit severely the permissible scope of such collusive ratemaking by these bureaus (H.R. Rep. 96-1069, *supra*, at 3-4, 10, 27-29; S. Rep. 96-641, 96th Cong., 2d Sess. 13-14 (1980)).

II. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE PETITIONERS' PRIVATE PRICE FIXING AGREEMENTS

The *Noerr-Pennington* doctrine[28] reflects this Court's conclusion that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135. In other words, Congress did not intend the antitrust laws to apply to attempts, successful or not, by private parties to obtain governmental action that restrains competition. But the conduct at issue in this case is not an attempt to obtain a governmental restraint; it is a privately agreed-upon restraint—a classic price-fixing contract, combination, or conspiracy in restraint of trade. Its fundamental nature as a privately-imposed restraint is not changed merely because its results require governmental approval—or at least acquiescence—in order to take effect.

The Court distinguished in *Noerr* between combinations of private parties for the purpose of "persuad[ing] the legislature or the executive to take particular action with respect to a law that would

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[28] The *"Noerr-Pennington"* doctrine was developed in three cases: *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1971).

produce a restraint or a monopoly," which are not prohibited by the Sherman Act, and "combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom * * * through the use of such devices as price-fixing agreements," which do violate the Sherman Act. 365 U.S. at 136. *Noerr-Pennington* does not shield petitioners' collective rate agreements because they are the latter type of combination.

Thus, submission of collectively formulated rate proposals to a state agency in the context of statutory schemes based on carrier initiation of rates and rate increases through tariff filings is fundamentally different from petitioning a legislature or state agency affirmatively to exercise its policymaking powers. In any event, as the courts below recognized (Pet. App. 44a), even if the kind of petitioning that occurs when carriers seek state approval of their proposed rates were itself protected by *Noerr*, " 'the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine.' " [29] If this were not so, then any group of competitors could agree to fix prices and then attempt to immunize their conduct by sub-

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[29] Petitioners' argument that agreement on prices is necessary to any presentation of proposed rates it without merit. Under the final judgment, the rate bureaus still may provide economic and statistical information that carriers may need to formulate rate proposals and may publish a compilation of individually determined rates. See page 7, *supra*. The argument that a business "needs" price fixing agreements with competitors in order reasonably to price its goods is one that the Sherman Act does not countenance. *National Society of Professional Engineers*, 435 U.S. at 696; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 220-222.

mitting a legislative proposal to their congressman authorizing the anticompetitive activity. *Noerr-Pennington* simply does not protect the antecedent illegality; it protects the act of petitioning itself.

Petitioners' argument to the contrary is foreclosed by this Court's holding in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945),[30] that submission to a regulatory agency of collectively established rates does not immunize the collective ratemaking from the Sherman Act. It also is foreclosed by the holding in *Cantor* v. *Detroit Edison Co.*, *supra*, that a private utility's decision to institute anticompetitive conduct is not protected by *Noerr*, even though the private decision could be implemented only after a tariff was filed with and accepted by a state regulatory agency. 428 U.S. at 601-602 (Stevens, J.).[31]

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[30] See also the cases there cited and discussed, 324 U.S. at 456-458.

[31] See also *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 807 (2d Cir. 1983), cert. denied, No. 82-2128 (Jan. 16, 1984) ("a mere *incident* of regulation—the tariff filing requirement—is [not] tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*"); *California* v. *FPC*, 369 U.S. 482, 488-489 (1962); *United States* v. *RCA*, 358 U.S. 334 (1959); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 981-983 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981). As the court of appeals noted, this Court has never held that regulatory approval is sufficient to confer antitrust immunity, but instead has held to the contrary.

Moreover, immunizing rate agreements would thwart the principal objective of the *Noerr-Pennington* exemption—to protect the flow of information to public officials. See *Noerr*, 365 U.S. at 137. The collusive activities at issue here limit the

As we have shown (see page 21, *supra*), the restraint at issue in this case—a rate agreement among carriers—is attributable to petitioners' private decisions rather than to governmental action sought by petitioners. By approving the agreed-upon rates or even by approving the rate agreements themselves, the states do not create any restraints on competition; they merely allow private anticompetitive agreements and determine whether the rates set pursuant to those agreements are reasonable and otherwise in accord with state law. Thus, the motor carriers whose agreements are at issue here are not engaging in "mere attempts to influence the passage or enforcement of laws" (*Noerr*, 365 U.S. at 135) by the state as sovereign; they are acting to reduce competition by fixing prices among themselves.[32]

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flow of information by substituting a single proposal for the diversity of views and supporting evidence that regulators would otherwise receive.

[32] The *Noerr* doctrine, as the Court has emphasized, does not protect every restraint of trade that is related to lawful political activity or exercise of First Amendment rights. See 1 P. Areeda & D. Turner, *Antitrust Law*, § 205, at 51 (1978). Rather, that doctrine recognizes and incorporates the general principle that "First amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514-515 (1971), citing *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949). Accordingly, the private agreements at issue here, which constitute per se violations of Section 1 of the Sherman Act, are not immune from that Act under *Noerr-Pennington*.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
AND
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
AND
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

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REPLY BRIEF FOR PETITIONER NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

ARGUMENT

I. Congress Could Not Have Intended to Prohibit North Carolina From Establishing a System of Intrastate Motor Carrier Regulation That May Restrain Competition

The State of North Carolina and its Utilities Commission in their *amicus* brief, as well as we in our opening brief,

stressed the crucial importance of this case to North Carolina's regulation of intrastate motor common carrier rates. If left undisturbed, the decision below will require the dismantling of a regulatory scheme that has been in effect for more than 40 years. We further pointed out that the holding that compulsion is necessary for state action immunity for private parties leads to an untenable inference, namely, that although Congress expressly reserved to the states the power "to regulate intrastate transportation provided by a motor carrier" (49 U.S.C. § 10521(b)), it intended to condemn state laws regulating intrastate rates in the same manner as the federal laws regulate interstate rates. Thus, as Judge Clark pointed out in his dissent, "the majority opinion . . . completely ignores the Interstate Commerce Act, public policy, history, and fairness" (Pet. App., 92a).

The Interstate Commerce Act immunizes from the federal antitrust laws the collective formulation of interstate rates by motor common carriers pursuant to agreements filed with and approved by the Interstate Commerce Commission. However, under 49 U.S.C. § 10706(d)(2), the ICC "may not approve an agreement . . . establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure."

North Carolina has adopted a statute immunizing from its antitrust laws the collective formulation of intrastate rates in language that is virtually identical to former Section 5a of the Interstate Commerce Act, former 49 U.S.C. § 5b, 62 Stat. 472. Like its Federal counterpart, NCGS § 62-152.1(e) provides that the North Carolina Utilities Commission "shall not approve . . . any agreement which establishes a

procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure." It is this provision of North Carolina's law that the Court below found to preclude the application of the state action doctrine. It held that North Carolina's laws must provide for *only* independently formulated rates or *only* collectively formulated rates, but not both.

The anomalous result is that carriers cannot collectively formulate interstate rates *unless* each carrier has the right to take independent action, but cannot collectively formulate intrastate rates *because* each carrier has the right to take independent action. As the Government itself pointed out, since carriers file individual rates, there would be *less* competition if carriers were required to file only collective rate proposals. Thus, both the Court below and the Government are saying that the states can bring their regulatory schemes into consonance with the federal antitrust laws only by eliminating rate competition altogether. Obviously, this does not further antitrust policy. Rather it stands it on its head.

The Government asserts that "the restrictions imposed by federal law on collective interstate ratemaking by rate bureaus are much more exacting than state regulation of intrastate practices and serve the same basic purpose as the district court's injunction" (Government Br., 32). This is not true. In the Motor Carrier Act of 1980, to which the Government refers, Congress specifically reaffirmed that collective rate formulation by motor common carriers is essential to achieving the goals of the National Transportation Policy. While it established specific guidelines to which rate bureau agreements must conform, as this Court observed in *ICC v.*

American Trucking Assns., ___ U.S. ___, 81 L.Ed.2d 282, 286 (1984): "The most significant deregulatory aspect of the guidelines is a ban on discussions of tariffs applicable solely to individual carriers." And, even this "ban" is subject to exceptions for "general rate increases or decreases", "changes in commodity classifications", and "changes in tariff structures", among others. See, 49 U.S.C. § 10706(b)(3)(D). In contrast, the District Court's injunction flatly prohibits any collective action whatever respecting rate formulation.

Collective rate action by motor common carriers in North Carolina cannot be viewed apart from the pervasive scheme of regulation imposed by North Carolina on those carriers. North Carolina's transportation policy, which is modeled upon the National Transportation Policy, states among its goals to "provide just and reasonable rates . . . without unjust discrimination", "to promote and preserve adequate, economical and efficient service to all the communities of the state . . .", "to foster a coordinated statewide motor carrier service" and "to conform with the national transportation policy and the federal motor carrier acts . . ." See G.S. 62-2, G.S. 62-259. Specifically, with respect to motor common carrier rates, North Carolina has made unlawful "any unreasonable difference as to rates . . . either as between localities or as between classes of services." G.S. 62-140. It has also required that rates be "just and reasonable." G.S. 62-131. Further, the state has mandated a "stable rate structure" and "uniform rates for the same or similar services by carriers of the same class." G.S. 62-152.1.

The District Court's injunction will require the dismantling of this regulatory scheme, for it is manifest that its policies cannot be carried out without collective action with respect to rates. Thus, if there is to be a "stable rate structure" of just, reasonable and non-discriminatory rates,

there must be, not "a loose aggregation of separately established rates, but a single entity composed of interrelated rates" collectively formulated by the carriers. *Class Rate Investigation*, 262 I.C.C. 447, 690 (1945). See H. Rpt. No. 1100, 80th Cong., 1st Sess. (1947), p. 9.[1] So too, if rates are to be uniform for similar services by carriers of the same class, they must be formulated collectively.

The Government acknowledges that this case turns upon Congressional intent. As the Government put it:

> [T]he state action doctrine in antitrust law that this Court articulated in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases rests on dual principles of federalism: the Sherman Act's proscription of anticompetitive conduct is the supreme law of the land, but Congress could not have intended through its silence in the Sherman Act to prohibit action of a state that may restrain competition." (Government Br., 9-10).

We agree that the question is the intent of the Congress and we submit that the answer is plain. In the Motor Carrier Act of 1935 Congress provided that nothing therein "shall be construed . . . to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." Former Section 202(b)(1) of the Interstate Commerce Act, former 49 U.S.C. § 302(b)(1), 84 Stat. 1500. We submit that,

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[1]Recognizing that a change in one rate "frequently necessitates like changes in competitive rates in order to avoid the unjust discrimination, and undue preference and prejudice which are forbidden by the [Interstate Commerce Act]," the drafters of the Reed-Bulwinkle Act observed that "there would seem to be no practical alternative to consultation among all interested carriers before a change is made in any of their rates." H. Rpt. No. 1100, 80th Cong., 1st Sess. [1947] at p. 8.

especially in view of its subsequent enactment of the Reed-Bulwinkle Act, Congress could not have intended that the states' "exclusive" power be limited by the strictures of the Sherman Act. In other words, it is untenable to infer, as the Court below did, that the Congress intended to pre-empt state law modeled on federal law and designed to carry out in intrastate commerce the same policy that federal law is designed to carry out in interstate commerce.

Reed-Bulwinkle followed on the heels of this Court's decision in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945). Although motor and rail carriers had been collectively formulating rates for submittal to the ICC and state commissions for many years, *Georgia* created uncertainty as to the vulnerability of such collective action to antitrust attack. Therefore, in rapid response to that decision, Congress enacted the Reed-Bulwinkle Act, which authorized the ICC to approve and immunize ratemaking agreements.[2] In considering the immunity it conferred, Congress was well aware that carriers collectively formulated intrastate rates for filing with state commissions. In *Hearings on a Bill to Amend the Interstate Commerce Act With Respect to Certain Agreements Between Carriers; H.R. 2536 Before the Subcomm. on Interstate and Foreign Commerce*, 79th

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[2]The *Georgia* case did not address the need for antitrust immunity to effectuate regulatory goals because the issue before the Court was whether Georgia's complaint alleging a conspiracy involving coercion of carriers and discrimination against it stated a cause of action cognizable by this Court in the exercise of its original jurisdiction. Thus, Congress did not enact the Reed-Bulwinkle Act to overturn *Georgia*, but rather to remove "the existing state of uncertainty [raised by *Georgia* and other antitrust cases] as to the extent to which carriers may engage in joint activity without risk of violating the antitrust laws." S. Rep., No. 44, 80th Cong., 1st Sess. (1947) at 7. Of course, the state of the law would not have been "uncertain" were *Georgia* as dispositive on the lawfulness of collective activity as the Government contends here.

Cong., 1st Sess. (1945), at pages 24-25, Mr. F. G. Hamley, General Solicitor, National Association of Railroad and Utility Commissioners, speaking on behalf of the state regulatory bodies, testified:

> Mr. Chairman, the State regulatory commissions conceive that they have a direct interest in this legislation. Most of the rate bureaus, conferences, and associations which establish, file and publish interstate rates, fares and charges, perform the same functions with regard to *intrastate* rates within their respective geographical boundaries. *What Congress decides to do regarding the operation of these agencies will therefore not only affect interstate commerce regulated by the Interstate Commerce Commission, but also intrastate commerce and State commission regulation thereof.* (emphasis added).

Thus, the Government is wrong when it says that "[t]he differences in the antitrust immunity available for interstate and intrastate ratemaking are simply the result of choices made by Congress. . . ." (Government Brief, 31). The inference to be drawn is that Congress intended to confer antitrust immunity for the collective formulation of both interstate and intrastate rates.[3]

Passage of the Motor Carrier Act of 1980, P.L. 96-296, confirms this view. S. 2245, the Senate version of the bill, proposed in Section 13(a)(3)(B)(iv) that:

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[3]At least one Court has held that Congress could not have intended the regulatory gap "that would result from the ICC being unable to immunize agreements on intrastate rates that affect interstate commerce." In *Atchison, T. & S.F. Ry. Co. v. United States*, 597 F.2d 593, 594 (7th Cir. 1979) the Court rejected the proposition that "the scope of [the ICC's] jurisdiction to immunize railroad rate agreements from the effect of the antitrust laws is less extensive than the antitrust laws themselves."

> (vii) the organization [Bureau] may not docket or handle rates for intrastate transportation without specific authorization from the states involved; . . .

However, the Congress specifically rejected this. As the House Report put it:

> In the bill as originally introduced there was a provision which prohibited the rate bureaus from docketing or handling rates for intrastate transportation without specific authorization from the states involved. The Committee eliminated this section because it received very little evidence on that particular subject. The Committee intends to continue looking at this area, but for the time being, the *status quo* should apply with respect to intrastate ratemaking. H. R. 96-1069, 96th Cong., 2nd Sess. 29.

As the record herein shows, the "*status quo*" in North Carolina is that the carriers there have been "docketing or handling rates for intrastate transportation" under authority from the State of North Carolina for more than 40 years. In sum, whether this case is viewed as one for "preemption" analysis or "exemption" analysis, the intent of Congress is plain.[4] It is simply inconceivable that Congress intended the antitrust laws to be applied to reach the result of the decision below.

It is especially significant that the activities challenged here have been conducted openly and without challenge for more than 40 years. In *Bankamerica Corp. v. United States*, ____ U.S. ____, 103 S.Ct. 2266, 76 L.Ed.2d 456

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[4]See the discussion of the distinction between these concepts in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), at 61 (Dissent of Justice Rehnquist, in which the Chief Justice and Justice O'Connor joined.)

(1983), this Court disallowed an attempt by the Government to apply the antitrust laws to activity that had been openly carried on for many years without challenge to its lawfulness. At issue was the meaning of Section 8 of the Clayton Act, which the Government argued prohibited interlocking directorates among banking and insurance companies. At 76 L.Ed.2d 463-464, the Court stated:

> [T]he Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now. On the contrary, for over 60 years, the Government made no attempt . . . to apply Section 8 to interlocks between banks and nonbanking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record throughout the period. We find it difficult to believe that the Department of Justice and the Federal Trade Commission, which share authority for enforcement of the Clayton Act, and the Congress, which oversees those agencies, would have overlooked or ignored the pervasive and open practice of interlocking directorates between banks and insurance companies had it been thought contrary to the law.

The Court, quoting *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941), noted that "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." Continuing, the Court said: "In the circumstances of this case, the Government's failure for over 60 years to exercise the power it now claims under Section 8 strongly suggests that it

> did not read the statute as granting such power." (footnotes omitted).

The Court went on to point out in *Bankamerica* that "the business community directly affected *and* the enforcing agencies *and* the Congress have read the statute the same way for 60 years." 76 L.Ed. 2d at 464 (emphasis in original). By substituting "40 years" for "60 years" the identical language could be used to describe the situation here. To use the Court's words: "If changes in economic factors or considerations of public policy counsel the extension of the [Sherman Act to the collective formulation of intrastate rates] it is a simple matter for Congress to say so clearly." 76 L.Ed.2d at 465.

II. Compulsion Is Not Necessary for State Action Immunity for Private Parties

The Government relies solely on *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773 (1975) and *Cantor v. Detroit Edison Co.*, 429 U.S. 579 (1976), to support its argument that compulsion is necessary for the application of the state action doctrine here. But *Goldfarb* and *Cantor* were the first state action cases decided by this Court in the more than thirty years after *Parker*. Since the *Cantor* decision in 1976 there has been a series of cases in which the doctrine has evolved and matured. In 1980, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 455 U.S. 97, the Court reviewed those decisions, *including Goldfarb* and *Cantor*, and synthesized from them the following two tests for state action immunity when the action is not that of the state itself:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. (citations omitted).

That there is no third "compulsion" test for private parties is clear from this Court's latest state action decision, *Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). Again examining its decisions beginning with *Parker*, the Court concluded that when a state legislature adopts legislation or a state supreme court acts in a legislative capacity, the actions are those of the state and "*ipso facto* are exempt from the operation of the antitrust laws." However, when the action is "by others pursuant to state authorization" there must be a clear articulation of policy and active supervision of its implementation. This is the test whether the "others" be non-sovereign public officials or private persons. As the Court pointed out in *Hoover*, it applied that test in both *Midcal*, in which the defendant was a state agency, and *Cantor*, in which the defendant was a private party. Referring to those cases, the Court said: "In each of those cases it was necessary for the court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the state 'acting as a sovereign.'" 80 L.Ed.2d at 607, n. 33. Thus, the Court clearly rejected the Government's argument that private parties are subject to a different test for state action immunity than are non-sovereign public parties.

The Government does not make any serious attempt to deal with *Hoover*. It merely makes the bald assertion in a footnote that "nothing in *Hoover* casts any doubt on the Court's earlier holdings in *Goldfarb* and *Cantor* that only compelled private action can be state action" (Government Brief, 25, n. 19). As shown, this is simply wrong. Moreover, our reading of *Hoover* is supported by the recent *en banc* decision of the Fourth Circuit in *N.C. Ex Rel. Edmisten v. P.I.A. Asheville*, 740 F.2d 274 (1984). There the Court stated:

> Since the Supreme Court's decisions in *Bates v. State Bar of Arizona*, 433 U.S. 350, 362, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977), and *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the right of a private entity to claim *Parker* immunity is clear. Under *Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), a private party has that right even when the state does not compel, but only "authorizes" or "approves" the activity. . . . 740 F.2d at 276-277.

Thus, the Fourth Circuit has joined the Ninth Circuit in expressly rejecting the argument that compulsion is necessary for immunity for private parties under the state action doctrine.[3]

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[3]As we pointed out in our initial brief, in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823, n.8 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (1982), the Court stated: "It appears that the statement in *Goldfarb* regarding compulsion refers to a combination of the criteria that there be both a clear articulation of state policy and active supervision by the state itself. 421 U.S. at 788-91, 95 S.Ct. at 2013-2015."

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectively submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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IN THE

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OCTOBER TERM, 1984

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and
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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC), Petitioner, hereby submits its brief in reply to the brief for the United States (Government) and the briefs of various *amici* filed in support of the Government.

INTRODUCTION

In its opening brief, the NARUC argued that under the facts presented in this case, the five State regulatory commissions need not compel regulated intrastate motor car-

riers to file only collective rate proposals in order for the collective ratemaking activities of these carriers to be immune from Federal antitrust liability under the State action doctrine. Relying on such recent decisions of this Court as *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*) and *Hoover v. Ronwin*, ____ U.S. ____, 80 L.Ed.2d 590 (1984), the NARUC asserted that the collective activities herein under consideration were exempt from antitrust proscription because they were undertaken pursuant to clearly articulated and affirmatively expressed State policies and because they were actively supervised by the regulatory commissions of the respective States.

In its brief, the Government disagrees, arguing that the collective ratemaking activities of the motor carriers must be literally compelled by the States if antitrust immunity is to attach. The NARUC believes that in conjunction with the other petitioners, it has refuted this position, and therefore will not burden the Court by repeating earlier arguments. We file this brief, however, to reply to new issues raised in the briefs of *amici* in support of the Government. Specifically, we wish to briefly reply to the Amici Curiae Brief for the State of Iowa and the States of Wisconsin, Delaware, Rhode Island, and Indiana (The Attorneys General) and to the Amici Curiae Brief of the National Small Shipments Traffic Conference and Drug and Toilet Preparations Traffic Conference (the Shippers).

ARGUMENT

I. REPLY TO THE ATTORNEYS GENERAL

It is truly remarkable that in their brief the Attorneys General advance positions which would direct the Federal

courts to review the need for and wisdom of State regulatory activities under the guise of Federal antitrust review. Yet, throughout their brief, these State officials ask this Court to review State regulatory policies to determine whether these policies are wise, or whether they have been adopted for "legitimate" purposes. We strongly urge the Court to reject this analysis.

A. The Attorneys General Preemption Argument

In Part I of their brief (at 3-7), the Attorneys General argue that State collective ratemaking policies are *preempted* by Federal antitrust laws *even if these policies compel collective rate submissions* (at 6-7). The Attorneys General assert that the reasons why the States adopt such a policy should be assessed, and if these reasons are not good enough (in the opinion of a Federal court), State regulatory policy must give way. (*Id.*)

This preemption argument cannot withstand scrutiny. Plaintiffs challenging State or local regulation on the ground that such governmental actions are preempted by Federal antitrust law bear the heavy burden of overcoming the presumption "that preemption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States." *Community Communications Co. v. City of Boulder,* 455 U.S. 40, 61 (1982) (Rehnquist, J. dissenting, joined by the Chief Justice and Justice O'Connor). In effect, preemption analysis places States in a stronger position to defend their actions than does exemption analysis. Yet, despite invoking preemption analysis, the Attorneys General fail to apply or even acknowledge the analysis described in Justice Rehnquist's opinion, instead offering spurious examples of State actions that would be preemp-

tible because they implement insufficient or unwise State interests. The irony here is palpable. Justice Rehnquist offered preemption analysis as a way for Federal courts *to avoid* assessing the legitimacy of "State interests" or the reasonableness of State regulatory policies and procedures. 455 U.S. at 65-70 ("the State . . . should not be hauled into federal court in order to justify its decision that competition should be replaced with regulation." *Id.* at 70).

In the final analysis, the Attorneys' General preemption argument (which is clearly not Justice Rehnquist's preemption analysis) must fail because it calls upon the Federal courts to sit as "super legislatures", reviewing the wisdom and reasonableness of State legislation and regulations. Applied broadly, the Attorneys' General position would call into question every State and local enactment which might have even minor anticompetitive effects. Clearly, this Court could not sanction such an outcome.

B. The Attorneys General State Action Argument

The State action argument offered in the Attorneys General brief (at 7-14) contains the same basic flaws as their preemption analysis. Here too these State officials ask this Court to assess the legitimacy of the State interests in maintaining the current collective ratemaking system. Finding these interests insubstantial and unworthy of consideration, the Attorneys General conclude that the State action exemption should not apply because the State regulatory commissions, in league with intrastate motor carriers, have lost sight of the public interest (at 13-14). These contentions cannot go unchallenged.

First, there is absolutely no support in the record for this Court to conclude that the State regulatory commis-

sions have abandoned the public interest for purposes of administrative convenience, or indeed, for any other reason. Rather, the record contains ample evidence documenting the close scrutiny to which motor carrier rate proposals are subjected by the State commissions (E.G. see Affidavit of J.C. Turner, J.A. 50-54). Indeed, the fact that the States closely and actively supervise motor carrier ratemaking activities has never been challenged by the Government in this case. Therefore, any contentions that the States have abandoned the public interest in just and reasonable motor carrier rates is simply wrong.

More importantly, the reasons why the States have adopted their current collective ratemaking policies are not relevant to the application of the State action doctrine Under the test announced by the Court in *Midcal,* State policies on collective ratemaking are exempt from antitrust proscription if they are clearly articulated, affirmatively expressed, and actively supervised. The issue before the Court is whether a State must compel anticompetitive activities as the only way of proving that its regulatory policies are clearly articulated and affirmatively expressed.

However, the wisdom of the State ratemaking policies or the reasons for their adoption *are not in issue,* nor should they be. In the early years of this century, this Court invoked the Fourteenth Amendment to undertake a searching analysis of the wisdom and legitimacy of State regulatory policies and enactments. During this, the so-called *Lochner* era (from *Lochner v. New York,* 198 U.S. 45 (1905)), this court invoked the doctrine of substantive due process to strike down State labor laws, child welfare statutes and other social welfare legislation on the ground that these enactments were based upon insufficient motives, unworthy purposes, or illegitimate goals.

This Court has abandoned the substantive due process era, and therefore, no longer questions, on Fourteenth Amendment grounds, the motives of a State's exercise of its police powers. By urging this Court to examine the motives of the States in this case, the Attorneys General seem to advocate a return to the *Lochner* era. They believe that Federal courts must assess the motives of a State's regulatory program under the antitrust laws, and further, must strike down State enactments resting upon insufficient motives, unworthy purposes, or illegitimate goals. We urge this Court to firmly reject this view of the State action exemption, which threatens not only State motor carrier regulation, but every State or local regulatory program having any anticompetitive effect.

In the final analysis, the Attorneys General object to intrastate collective ratemaking because, in their opinion, it is unwise public policy. This court, however, is not the forum in which to argue the merits of collective ratemaking. The Attorneys General have ample remedies if they wish to eliminate collective ratemaking in their respective jurisdictions: they may petition their legislatures to abolish the practice, or they may bring law suits in State Court under State antitrust laws. They must not, however, be permitted to litigate the wisdom of State policies in light of Federal antitrust law in Federal Court.

II. REPLY TO THE SHIPPERS

The NARUC wishes to briefly reply to the Shippers' request that "this Court make it clear in its opinion that if State-mandated collectively-made rates are to be immunized, their carriers may be left free to publish individual discount tariff items". (Shippers Br. at 14). Despite their support for the Government's compulsion

argument, the shippers are obviously fearful that the States will take one of the two options available, and compel collective ratemaking of *all* intrastate rates.

The NARUC stongly objects to any suggestion that this Court, in effect, write new statutes for the States in this area of regulation. Should the Court affirm, it should not then tell the States that it would be somehow better if they were to abolish, rather than compel, collective actions. Moreover, we are puzzled by the Shippers' conclusion that the system they advocate (collectively-made maximum rates with individual discounts permitted) differs in any material way from the ratemaking systems now in effect. If the Shippers want a regulatory system combining the benefits of collective ratemaking *and* independent action, they are on the wrong side of the case. They should be supporting the position of the NARUC that the States must have the flexibility, without fear of antitrust proscription, to tailor their regulatory systems to the needs of the consumer interests that the Shippers represent. In sum, we agree with the Shippers that "State-mandated collectively set rates can coexist along side individual carrier-made rates which are not collectively set." (*Id.*) We hope the Court also agrees.

CONCLUSION

Beginning in the District Court, the NARUC has argued that the State regulatory commissions are the real parties in interest in this litigation. Despite the Government's repeated attempts to suggest that these State agencies will be unaffected if this Court affirms (Government Br. at 30, n. 25), the briefs of the Attorneys General and the Shippers make it quite clear that the issues herein under consideration lie at the core of the respective State regulatory

programs. Quite surprisingly, the Attorneys General, *who are also State officials,* have urged this Court to sanction the direct intrusion of the Federal judiciary into the regulatory affairs of the State through the antitrust laws. We respectfully request this Court to forcefully reject the position that these laws authorize federal judges to assess the wisdom or purposes of State regulatory enactments. Moreover, we respectfully request that the decision of the Court of Appeals herein under review be reversed.

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No. 82-1922

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
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and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN MOVERS CONFERENCE AND BULK CARRIER CONFERENCE AS *AMICI CURIAE*

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UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF AMERICAN MOVERS CONFERENCE AND BULK CARRIER CONFERENCE FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The American Movers Conference (hereinafter "AMC") and the Bulk Carrier Conference (hereinafter "BCC") hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the at-

torneys for the petitioners was requested but refused. The respondent has consented to the filing of the attached brief. Neither the AMC nor the BCC has been a participant in this case prior to this filing as *amici curiae*.

The AMC is the national trade association of the household goods moving industry. Many of its member motor carriers belong to state organizations which engage in collective intrastate ratemaking, the legality of which is under challenge in this action. In addition, certain of these state collective ratemaking organizations are associated with the AMC although none are among the petitioners in this case.

The BCC is a motor carrier rate bureau which engages in collective motor carrier ratemaking for both interstate and intrastate movements of bulk commodities by motor carriers.

If the decision of the Court of Appeals is upheld then the method of setting rates for intrastate motor carrier transportation in many states by carrier members of each organization and the activities of the associated state associations of the AMC will be in serious jeopardy. In addition, the BCC may be unable to continue its current practice of collective intrastate ratemaking. Consequently, this matter is of vital importance to each organization and to their members.

The Court of Appeals decision in this case, *United States* v. *Southern Motor Carriers Rate Conference*, 702 F.2d 532 (5th Cir. Unit B, 1983), dealt with the issue of compulsion by the states as a necessary part of the state action antitrust immunity doctrine. It is our position that, contrary to the view of the Court of Appeals, there was sufficient compulsion by the states to satisfy the compulsion element of the state action doctrine should this Court find such compulsion to be necessary for the state action doctrine to be applicable.

It is also our contention that in this matter the lower courts failed to examine the validity of the state interest in and active supervision of the particular motor carrier regulatory system devised by each of the states. Under the past decisions of this Court, such an examination is necessary when the issue of state action antitrust immunity is present. In addition, in this case, the lower courts failed to recognize the accepted role of private collective action as part of a regulatory system.

These legal issues were not developed by the petitioners in the litigation below and it is our understanding that they will not be presented by the petitioners to this Court. These issues are of very real importance to the questions involved and the interests of justice would not be served unless these legal issues were considered by this Court.

Accordingly, it is respectfully requested that leave to file the attached brief *amici curiae* on behalf of the AMC and the BCC be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-1922

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMERICAN MOVERS CONFERENCE AND BULK CARRIER CONFERENCE AS *AMICI CURIAE*

American Movers Conference and Bulk Carrier Conference as *amici curiae*, support the position of Southern Motor Carriers Rate Conference, Inc., *et al.*, petitioners.

STATEMENT

The American Movers Conference is the national trade association of the household goods moving industry. Many of its member motor carriers belong to state organizations which engage in collective intrastate ratemaking, the legality of which is under challenge in this action. In addition, certain of these state collective ratemaking organizations are associated with the American Movers Conference although none are among the petitioners in this case. The current method of setting rates for the intrastate motor carrier transportation of household goods by the carrier members and the associated state associations may be seriously affected by the outcome of this case.

The Bulk Carrier Conference is a motor carrier rate bureau which engages in collective motor carrier ratemaking for both interstate and intrastate movements of bulk commodities by motor carriers. Its intrastate ratemaking activities could be seriously affected by the outcome of this case.

Neither the American Movers Conference nor the Bulk Carrier Conference has been a participant in this case prior to this filing as *amici curiae*.

ARGUMENT

I. Contrary to the View of the Court of Appeals for the Fifth Circuit, There Was State Action Compelling Motor Carriers to Participate in the Particular State Regulatory Schemes in Issue.

In *United States* v. *Southern Motor Carriers Rate Conference*, 702 F.2d 532 (5th Cir. Unit B, 1983), the Court of Appeals held that the collective formulation by motor carriers of rate proposals to be submitted to state regulatory officials for approval or rejection was not exempt from Section 1 of the Sherman Act (15 U.S.C. § 1) under the "state action" exemption because the partici-

pating carriers were not compelled by the respective states to so act. The appellate court was of the opinion that compulsion by the state was necessary for state action immunity to be available.

The Court of Appeals failed to analyze properly, from the standpoint of compulsion, the system of motor carrier regulation in effect in each state. The Fifth Circuit stated:

> But where the option to compete or join a system of state regulation at all is up to the private party, state action does not exist. *United States* v. *Southern Motor Carriers Rate Conference*, 702 F.2d at 541-542, footnote 18.

The Court of Appeals' assumption that motor carriers could elect to be regulated or not regulated by the respective states is incorrect. Motor carriers in the states with which this case is concerned (Alabama, Georgia, Mississippi, North Carolina and Tennessee) have an option as to whether they wish to participate in a collective manner at the *initial* stage of the state regulatory process, but the carriers have no option as to whether they will be regulated. As is reviewed by the District Court in its decision, each of the states in question has a statute charging a state commission with the specific duty of regulating motor carrier rates. *United States* v. *Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, 473-476 (N.D. Ga. 1979). Motor carriers operating in these states are compelled by state statutes and commission rules to submit their rates to a state commission before the rates become effective and the various commissions are charged under the applicable state law with ensuring that such rates are reasonable. Consequently, the states do compel motor carriers to submit to state regulation of their rates and the Court of Appeals is incorrect in holding that motor carriers were not compelled by the states to be subjected to rate regulation.

The rate "collusion" that the government has charged the bureaus with engaging in is a product of state regu-

lation. If the states did not regulate the rates of motor carriers there would be no commission to which rate proposals would be submitted. The "collusion" alleged is part of the state's regulatory process; take away from the states the option of allowing collective preliminary rate formulation and state rate regulation would remain. The numerous motor carrier rates would still be subject to review by state officials, only a state's option to allow initial rate development by those carriers choosing to do so collectively would be gone. In fact, as indicated by state officials to the District Court and as recognized by the District Court, the ability of the states to regulate effectively motor carrier rates is dependent on the collective process. *United States* v. *Southern Motor Carriers Rate Conference*, 467 F. Supp. 471, *supra*, at 477.

Here, certain states have elected to streamline their rate review process by allowing private groups to submit rate proposals. However, the states have avoided requiring carriers to join such groups for the purposes of preliminary rate proposal development if carriers do not so desire. This allows for more efficiency in the state rate review process.

The collective rate development in issue is part of each state's compulsory rate regulation system; the option to carriers allowed by the regulatory structure of each state is to decide whether to initially proceed with rate development individually or collectively. However, the carriers have no choice as to whether their rates will be subject to state regulation.

II. The Lower Courts Failed to Examine the Validity of the State Interest in and Active Supervision of the Particular Motor Carrier Regulatory System Devised by Each of the States.

What is at issue in this matter is whether states, as part of their regulatory procedure, may permit motor carriers to engage in collective rate development in ac-

cordance with state regulations prior to submitting those rates to a state agency for review, the submission of rates being compelled by state law. There is nothing in this Court's prior rulings on state action matters that would prevent such collective action as part of the process by which a state regulates motor carrier rates.

The past state action antitrust immunity opinions of this Court make it clear that if a state indicates there is a need for regulation of a particular market segment of an industry such regulation may be accomplished if supervised by the state even if there are anticompetitive aspects to the regulation. These cases have all emphasized the importance of the existence of a clearly articulated state policy to deal with a recognized problem. However, these decisions do not mandate a particular method by which a state must deal with the state recognized problem. Each of this Court's decisions shielding particular action from the antitrust laws due to state action has recognized that a state may decide to control the identified activity as the particular state has elected to even if the program otherwise was contrary to the purposes of the Sherman Act.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court placed major emphasis upon the economic conditions of the grape industry as justification for California establishing regulations for the marketing of raisins even though the particular state system had anticompetitive ramifications. 317 U.S. at 363-367. Similarly, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), this Court noted that Arizona's interest in regulating lawyer advertising was long established and recognized by Arizona's legislature. 433 U.S. at 361-362. Again, in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), it was held that a state regulatory system was free from antitrust attack under the state action exemption because the state statute clearly dealt with what the state felt was a problem of "abusive and oppressive acts"

by automobile manufacturers toward automobile dealers. 439 U.S. at 101.

Similarly, in those cases where this Court has found the state action doctrine not to be applicable in shielding particular activity from the antitrust laws the key issue in each was whether there was a clearly articulated and enforced state policy regulating a particular subject. Hence in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), concerning bar association minimum fee schedules, it was found that "state law simply does not refer to fees." 421 U.S. at 790. In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), which concerned a utility's distribution of light bulbs, it was stated in the plurality opinion that:

> [t]he distribution of electric light blubs in Michigan is unregulated . . . . The Commission's approval of respondents decision to maintain such a program does not, therefore, implement any statewide policy relating to light blubs. 428 U.S. at 584-585.

In *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which involved vertical price restraints on wine sales, it was found that "[t]he state has no direct control over wine prices, and it does not review the reasonableness of the prices set by the wine dealers." 445 U.S. at 100.

This Court's other two rulings concerning state action antitrust immunity both found the doctrine inapplicable because there was no clearly articulated state policy delegating to local governments regulatory powers over the commercial area in issue. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978).

These prior state action doctrine opinions face the issue of whether a state has clearly articulated a state policy pertaining to a recognized problem. In this case,

the Court of Appeals failed to examine whether there was a clearly articulated state policy. If a state were to identify a need to protect shipper interests and to prevent unreasonable or discriminatory motor carrier rates and establish a regulatory procedure to control that identified problem there is nothing in the past decisions of this court which would prevent a state from doing so even if there were anticompetitive aspects to the regulatory procedure established. This is especially true in certain segments of the motor carrier industry such as the movement of household goods or the movement of bulk commodities.

Household goods are usually moved directly for individual howeowners who often lack even a basic knowledge of the problems and scope of a household goods move. In effect, a lifetime of family possessions, often constituting a major portion of a family's assets, are being entrusted to others. Accordingly, states may well recognize a consumer protection responsibility toward such shippers so that rates are not so low that inadequate service is provided to this class of shippers and that those carriers engaging in this particular type of motor carrier activity are stable in their management and rate structure.

Likewise, a state may recognize a particular problem concerning the movement of bulk commodities. This category of freight consists mainly of chemicals which can pose serious environmental problems if not properly transported. States may well clearly articulate a need to ensure that only motor carriers which are financially viable and have adequate revenue returns to maintain quality service operate, on an intrastate basis, transporting chemical products.

The previous decisions of this Court dealing with the state action doctrine do not bar a state from specifically recognizing the possibility of problems of concern to all those using motor carrier services or of concern to spe-

cifically identified categories of shippers with particularized service problems (e.g. consumer or environmental concerns). A state must, under the established view of the state action doctrine, regulate the identified activity if antitrust immunity is to be available, but the Sherman Act should not be used to prevent a state from utilizing particular forms of regulation.

None of this Court's decisions dealing with the state action doctrine questioned the wisdom of the manner in which a state chose to enforce a state-recognized problem so long as there was enforcement. However, in the matter now before this Court it is actually the manner in which particular states have elected to regulate which the government is questioning. It is clear from the review of the state statutes undertaken by the District Court that each state has a clearly articulated state policy of regulating motor carrier rates. This is certainly different from those cases of this Court which have found the state action doctrine inapplicable. The government here challenges the method of state control. The government attacks the practice of each state, as part of its regulatory system, permitting carriers to collectively formulate rates in accordance with rules set by state commission to be submitted to a state agency for review. *See United States* v. *Southern Motor Carriers Rate Conference*, 439 F. Supp. 29, 42 (N.D. Ga. 1977). Other state action exemption cases decided by this Court, whether such exemption was found available or unavailable, did not attack the process by which a state regulated a situation after it was established that the state had clearly articulated a need to control a particular commercial function and did in fact regulate that function. Here the government seeks to alter this Court's traditional view of the state action exemption by challenging not the fact of a state's regulations or a state's clearly articulated need for regulation but a state's method of regulation.

We submit that there is no basis in this Court's past state action rulings that justifies permitting the courts to examine the process of state regulation once the need for such regulation is clearly articulated by the state either for all those utilizing motor carrier services or for particular categories of shippers and it is established that the state does regulate. To the contrary, this Court has clearly stated that a state may establish a regulatory mechanism "designed to displace unfettered business freedom." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, *supra*, 439 U.S. at 109.

The situation here is not unlike that in *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982) where the Ninth Circuit held that the state action doctrine shielded from the Sherman Act a challenge to the practice in Arizona of race tracks first discussing among themselves the division of racing dates before the issue was submitted to a regulatory commission with ultimate approval authority. It was found that Arizona had a clearly articulated state policy concerning the allocation of racing dates and specifically provided for discussions among the race track operators to take place prior to state regulatory action. As is the case with the motor carrier bureaus, the discussions and preliminary agreements among race track operators was part of the state's regulatory process. 670 F.2d at 816.

The government's real attack upon the motor carrier bureaus concerns the mechanisms of state regulation, not whether the state actually regulates, for that fact is not in dispute. This Court has already made it clear that the particular process of regulation by the states is not to be examined under the Sherman Act once the existence of such regulation is established. As was quoted with approval in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, *supra*,

> For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed. 439 U.S. at 111.

III. Private Collective Action Within a Regulatory Framework Is a Well Accepted Part of Regulatory Systems and Such Regulatory Options Should Not Be Denied to the States.

It is a well accepted practice within various federal and state regulatory regimens to utilize private groups to formulate initial regulatory proposals which are then subject to review by a government authority. These regulatory acts delegating the power to take initial action to private organizations often involve activity which, like the activity of the motor carrier bureaus in the states in question, could be considered anticompetitive. Such federal systems do not contain any statutory exemption from the antitrust laws (despite clear Sherman Act violation questions) and none is needed because the action of the groups are but an initial stage in the regulatory process ultimately subject to review by a legislatively established government policy. For instance, the Commodity Exchange Act permits commodity traders to form an association to establish standards for members but does not make membership compulsory. 7 U.S.C. § 21. Ultimate review of the actions of the private industry organization is subject to the regulatory control of the Commodities Futures Trading Commission.

Similar regulatory systems utilizing private industry group activity at an initial regulatory stage are or have existed in a number of regulatory areas such as coal production under the Bituminous Coal Act of 1937, 15 U.S.C. § 828 (repealed 1966), (*see, Sunshine Anthracite Coal Co.* v. *Adkins*, 301 U.S. 381 (1940); medical services under the Public Health Services Act, 42 U.S.C. § 291c (*see, Association of American Physicians and Sur-*

geons v. *Weinberger*, 395 F. Supp. 125 (N.D. Ill.) *aff'd*, 423 U.S. 975 (1975)); Indian affairs under the Klamath Termination Act, 25 U.S.C. §§ 564-564x (*see*, *Crain* v. *First National Bank of Oregon*, 324 F.2d 532 (9th Cir. 1953)), securities trading under the Securities Exchange Act of 1934, 15 U.S.C. § 78f (*see*, *First Jersey Securities, Inc.* v. *Bergen*, 605 F.2d 690 (3d Cir. 1979)); and fruit production under the Agriculture Marketing Agreement Act, 7 U.S.C. § 608a(6) (*see*, *Whittenberg* v. *United States*, 100 F.2d 520 (5th Cir. 1938)).

Similarly, states have utilized private organizations to undertake initial regulatory functions, with state agency review, even though the subject of the group regulatory formation activity may involve sensitive issues under the Sherman Act. *See e.g.*, *Arnold* v. *Board of Barber Examiners*, 45 N.M. 57, 109 P.2d 779 (1941), *Herrin* v. *Arnold*, 183 Okla. 392, 82 P.2d 977 (1938), concerning price agreements by barbers and cosmetologists; *Pennsylvania Coal Mining Association* v. *Insurance Department*, 471 Pa. 437, 370 A.2d 685 (1977) concerning insurance rates; *Bettcher* v. *State*, 140 Colo. 428, 344 P.2d 969 (1959) concerning hospital charges.

In each of these federal and state programs private groups, as with the motor carrier organizations involved here, are utilized as a part of the regulatory process—a process ultimately subject to regulatory agency review and decision. This is a long accepted administrative law practice. The ultimate review of the government body serves as a sufficient government role to justify such delegations. As Professor Davis notes in his *Administrative Law Treatise*, 2d Ed., pp. 193-198, 204-206 and page 22 of the 1982 *Supplement*, such delegations to industry groups are proper administrative procedures provided there are either statutory or administrative standards applicable to the delegation or there are sufficient safeguards to insure proper application. In the matter now before this Court, there are standards in each state stat-

ute that rates must be reasonable and interested parties have the right to protest rates and have the rates suspended or cancelled where the rates are not justified, and the burden of proof is on the carrier or carrier organization.

In this case the lower courts failed to realize that the collective activity of the motor carriers was a recognized administrative option available to the states to utilize in their regulatory process.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Fifth Circuit, Unit B, should be reversed and the matter returned to the United States District Court for the Northern District of Georgia for the entry of an order of dismissal or in the alternative for a finding as to whether the states in question have a clearly articulated and affirmatively expressed policy which is enforced requiring motor carriers to submit their rates and charges to regulation by the respective states.

Respectfully submitted,

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IN THE

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October Term, 1984

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

MOTION OF EDISON ELECTRIC INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The written consents of the Solicitor General on behalf of the respondent, the United States, and of the attorney for petitioner, National Association of Regulatory Utility Commissioners, have been obtained. The consent of petitioners, Southern Motor Carriers Rate Conference, Inc., and North Carolina Motor Carriers Association, Inc., was requested, but refused.

EEI is the association of the nation's investor-owned electric utility companies. EEI previously has not participated in the

instant case either as a party or as *amicus curiae*. However, counsel on this brief for EEI prepared and filed with the consent of all parties a brief *amicus curiae* in support of the petition for certiorari in this case on behalf of Southern Company Services, Inc., which was acting as agent for several members of EEI.

EEI has no interest in the practice of collective ratemaking, which is an activity peculiar to carriers. EEI's interest in this case arises from the fact that its members, as electric utilities, are subject to state regulation of service, price and other aspects of their businesses, and accordingly are concerned that the Fifth Circuit's decision, if upheld, would have impact far beyond its effect on collective ratemaking by carriers. As regulated entities, EEI's members are vitally interested in the standards to be established by this Court for the application of the *Parker v. Brown* and *Noerr-Pennington* doctrines to state regulatory processes and the activities of regulated entities pursuant to those processes.

EEI believes that the brief it is requesting permission to file will or may present to the Court discussion of several of the issues which is not likely to be contained in the briefs of the parties. These include:

First, petitioners argued below that this Court's formulation of the *Parker* doctrine in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), refined the Court's statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that private conduct is immune from antitrust scrutiny under the *Parker* doctrine only if it is compelled by a state acting as sovereign. The enclosed brief contains a more complete analysis of the sources of the *Goldfarb* compulsion language which should be helpful to the Court in its consideration of this issue.

Second, the enclosed brief contains additional discussion on the important issue of the effect of the Fifth Circuit's compulsion requirement for *Parker* immunity and its holding that the formulation of a tariff proposal is not protected by

Noerr-Pennington on forms of state regulatory activity other than collective ratemaking.

Third, many EEI members are in competition with governmental bodies acting in a proprietary capacity. It is believed that the enclosed brief should be accepted because of its discussion of the implications of the Fifth Circuit's holding that private parties are subject to a more stringent test for *Parker* immunity than are governmental actors.

Finally, the briefs of the United States in the court of appeals on the *Noerr-Pennington* issue were based upon a distinction between the collective presentation of a tariff proposal and the collective formulation of that proposal. EEI's brief contains discussion of this issue which it believes should be considered by the Court.

This the 26th day of July, 1984.

Respectfully submitted,

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Statement of J. Paul McGrath, Assistant Attorney General, Antitrust Division, Before the Committee on the Judiciary, United States Senate, Concerning S. 1578, the "Local Government Antitrust Act of 1983" (April 24, 1984) 11, 12

BRIEF OF *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE IN SUPPORT OF REVERSAL

INTEREST OF *AMICUS CURIAE*

The Edison Electric Institute (hereinafter "EEI") is the association of the nation's investor-owned electric utility companies. Its members serve 98 percent of all customers of the investor-owned segment of the electric utility industry and 75 percent of the nation's electricity users. EEI's members are subject to state regulation of service and price. Many jurisdictions also regulate capitalization, entry, and decisions concerning output, such as by certifying new power plants and by regulating their location.

As electric utilities subject to state regulatory supervision, EEI's members are concerned that the decision of the Court of Appeals for the Fifth Circuit (Unit B) will have an impact far beyond its effect on collective ratemaking by carriers. The decision of the court of appeals below may impose on EEI's members a much narrower definition of the "state action" doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943), than has been applied in the past, and may chill the formulation and presentation by private businesses of proposals for state administrative action. EEI's members have a direct interest in th issues presented for the Court's consideration in this case.

SUMMARY OF ARGUMENT

EEI files this brief as *amicus curiae* in opposition to the formal state compulsion requirement engrafted onto the *Parker v. Brown* "state action" doctrine by the Fifth Circuit. The particular activity in issue here, collective ratemaking, is a phenomenon peculiar to carriers. This brief is not submitted to support collective ratemaking, but rather to argue against the requirement imposed by the court below that actions taken pursuant to state regulatory schemes be compelled by the state in order to qualify for *Parker* immunity.

EEI submits that the *Parker* formula adopted by the Fifth Circuit is inconsistent with the variety of state regulatory systems which Congress intended to be permitted in the states' regulation of intrastate business activity essential to local welfare. Moreover, under our constitutional system of federalism, each of the fifty states must be permitted to determine in its own fashion the proper relationship between the state and businesses affected with a public interest in order to assure that essential public services are supplied at a reasonable price with acceptable external and regulatory costs. This Court's decisions establish that the Sherman Act was not intended to reach private conduct carried out pursuant to a clearly articulated and affirmatively expressed state policy if such conduct is supervised by the state. The decision below presumed the existence of active state supervision of the challenged activities, but found the Sherman Act applicable by erroneously inventing a "compulsion" requirement because private parties were involved. Moreover, by subjecting private parties to a more stringent standard of *Parker* immunity than their government-sponsored competitors, the decision discourages competition on the merits. This Court should reject the formulation of *Parker* adopted below which conceals a substantive judgment concerning the merits of collective ratemaking behind its creation of a requirement of form applicable to all state regulatory systems.

Finally, the decisions below artificially segregated group preparation of proposals for administrative action from the proposals themselves. The decisions failed to recognize that the First Amendment protects the entire process as a part of the right to petition the government guaranteed by the First Amendment and by the holdings of this Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

EEI urges that the erroneous formulation of the *Parker* and *Noerr-Pennington* doctrines by the courts below be reversed.

ARGUMENT

I. The Court Should Disapprove the Fifth Circuit's Formulation of *Parker* Immunity as Requiring State Compulsion and Should Subject State Regulated Businesses to No More Stringent Antitrust Exposure Than Their Government-Sponsored Competitors.

The decision in *Parker v. Brown*, 317 U.S. 341 (1943), that the California raisin prorate program was not subject to the Sherman Act was predicated on the concepts that (1) the Sherman Act was not intended to restrain officers or agents of the state from "activities directed by its legislature," (2) actions of state officials are not the types of "business combinations" to which the Sherman Act was directed, and (3) federalism requires that congressional intent to prohibit state regulatory programs not be inferred lightly. *Id.* at 350-52. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693, 698-99 (1974). EEI submits that the approach taken by the Fifth Circuit violates the concepts underlying *Parker* by erecting compulsion as a formal precondition to *Parker* immunity instead of focusing on the nature and goals of state regulation and of the Sherman Act. This Court has declared that *Parker* immunity is available when the challenged conduct is supervised adequately by state regulators pursuant to a clearly articulated and affirmatively expressed state policy. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

The states have extended comprehensive regulation over businesses offering essential services to the public in order to meet perceived genuine public needs of important local concern. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 514 (1979). Price and service regulation exist to protect consumers from unreasonable practices and to further other goals, including the encouragement of investment in public service industries and the creation of incen-

tives for efficiency in production and use of the service.[1] J. C. Bonbright, Principles of Public Utility Rates 5, 27-31, 49-62 (1961). A recent examination of one form of state regulation applied to many utilities and carriers, the certificate of public convenience and necessity, concluded that those enactments were guided by policies of preventing wasteful duplication of facilities, preventing the destruction of service through "ruinous competition," assuring the preservation of service to marginal customers by restricting cream-skimming, providing a favorable investment climate for needed businesses, and protecting the public from external costs, including environmental damage. Jones, *supra* p. 3, at 428.[2] State utility regulatory concerns have a compelling quality and are not to be cast aside lightly in the absence of express congressional action or in favor of bright line tests. *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S.Ct. 1713 (1983); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 103 S.Ct. 1905, 1915-17 (1983).

The Fifth Circuit, by conditioning *Parker* immunity upon compulsion, failed to take adequate account of these important state interests in structuring and regulating business activities

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[1]While the applicability to a particular industry of any or all of these reasons for displacing the marketplace with regulation may be debatable, as is the application to one industry of policies and practices developed in the regulation of another industry having dissimilar characteristics (e.g., the application to carriers of standards developed for the regulation of utilities having generally recognized local monopoly characteristics, *see* Jones, *supra* p. 3, at 505), this does not change the fact that the states have considered the condition of industries such as utilities and carriers that supply essential public services to their citizens and have enacted various regulatory systems designed to serve the public interest.

[2]While it might be objected that any group desiring protection could obtain state sponsorship of restrictions upon competition, experience does not support this argument. Ironically, the closest realization of the fear of private cartels using the state as a cloak is *Parker* itself. California's protectionism of a local crop understandably created a substantial Commerce Clause issue. Regulation of intrastate utility service involves stronger local interests while raising fewer threats to interstate commerce than the program in *Parker*.

which affect local welfare. In addition, the Fifth Circuit created a standard with anticompetitive implications insofar as it expressly subjected privately-owned regulated businesses to a stricter standard for *Parker* immunity than that applicable to the proprietary activities of governmental units. For these reasons, the decision below should be disapproved.

A. *The Fifth Circuit Misinterpreted this Court's Decisions as Embodying a Rigid Formal Compulsion Requirement.*

The Fifth Circuit erroneously concluded that this Court's formulation of the *Parker* doctrine includes a requirement of state compulsion. The court reached this faulty conclusion by finding that *Midcal* implicitly incorporated the statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975), that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."

In so concluding, the Fifth Circuit gave the Court's statement in *Goldfarb* far greater reach than was appropriate. The statement of a compulsion requirement was not necessary to the decision in *Goldfarb* because "far from exercising state power to authorize binding price fixing, [the state supreme court] explicitly directed lawyers not 'to be controlled' by fee schedules." 421 U.S. at 789 (footnote omitted). "It is difficult to believe that the Chief Justice [in *Goldfarb*] meant . . . to draw invidious distinctions between compulsion and prohibition; affirmative and negative requirements; and permissive, authorized and approved actions." Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 Colum. L. Rev. 1, 12 (1976).

The *Goldfarb* compulsion language was drawn from Justice Stone's observation in *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. The government and the Fifth Circuit read

this statement to mean that any state involvement short of formal compulsion constitutes "mere authorization" of anticompetitive conduct, and, therefore, is insufficient to overcome the paramount command of the antitrust laws. This view fails to recognize that state involvement in private conduct frequently takes a form that rises above mere authorization while falling below the Fifth Circuit's standard of formal compulsion. Moreover, the compulsion requirement applied below undermines the very foundation of *Parker* by failing to give fair regard to state regulatory policies that are an integral part of private conduct, but which do not compel private parties to act in a particular way. "The compulsions of law exist even when they take the form of approval or authorization." Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1384 (1978) (footnote omitted).

In *Parker*, Justice Stone cited *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47 (1904), for the proposition that a state may not authorize a violation of the antitrust laws, and it is to that case that we must look to determine the nature of the state authorization rejected by *dictum* in *Parker* and *Goldfarb*. The *Northern Securities* statements cited by Justice Stone were *dictum* in a case which had nothing to do with comprehensive state regulation of business. Moreover, with respect to matters of peculiarly local concern, the *Northern Securities* Court almost certainly would have sanctioned explicit state authorization of anticompetitive private conduct. Particularly in light of the evolution in the concepts of federalism, the scope of congressional power under the Commerce Clause, and the reach and breadth of the antitrust laws that has occurred since the decision in *Northern Securities*, the relationship between Congress and the states today cannot be governed by an expansive reading of its *dictum*.

Northern Securities affirmed a divestiture order preventing the consolidation under a holding company of a region's only two competing railroads where the purpose was to eliminate competition between the railroad lines. The principal issue

was whether, under the Commerce Clause, congressional power could be employed to direct one state-chartered corporation to sell the stock of another. The defendants' arguments and the Court's analysis took the then-accepted narrow view of congressional power under the Commerce Clause. Although the Court viewed Congress' authority to regulate interstate commerce as absolute, *id.* at 333, Congress at that time was powerless to regulate intrastate activities, *id.* at 331. "[A] State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade." *Id.* at 349. The defendants in *Northern Securities* argued that since they were state corporations acting within their charters, "the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations." *Id.* at 332.

The Court's finding of a violation and its affirmance of the remedy in the face of the defendants' argument says nothing about the appropriate treatment of anticompetitive conduct expressly authorized by a state pursuant to a program of business regulation. "[T]here [was] no pretense that the combination [there] in question was under the authority of the States under whose laws these railroad corporations were created," *id.* at 338,[3] and "nothing in the record tend[ed] to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition." *Id.* at 345.

The *dictum* concerning a compulsion requirement in *Goldfarb* was based upon Justice Stone's rejection of state authorization in *Parker* and must be read in light of his citation to *Northern Securities*. The fact that passive, uninformed state

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[3]Indeed, the defendants organized the holding company only after Minnesota, the state in which one of the railroads was incorporated, expressly had forbidden a merger of the railroads. *Pearsall v. Great Northern Railway Co.*, 161 U.S. 646 (1896).

"authorization" unrelated to any system of state regulation such as was involved in *Northern Securities* cannot serve to immunize private actors is no reason to conclude that *Parker* immunity depends upon state compulsion.

The Fifth Circuit stretched the impact of Justice Stone's comment far beyond its intended meaning. In addition, the decision of the Fifth Circuit is fundamentally inconsistent with this Court's recent recognition that issues of federalism cannot be resolved properly by mere reference to labels and bright line rules. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 103 S.Ct. 1905, 1915-17 (1983).

Because *Northern Securities* involved a regulated business it is easy to overlook that the avoidance of the Sherman Act urged in that case had nothing to do with state or federal regulatory concerns. *Northern Securities* supports the proposition confirmed by *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), that utilities are not exempt from the Sherman Act merely because of their status as such. Similarly, *Goldfarb* established that private conduct not sanctioned by the state is not immunized from antitrust attack merely because it might be viewed as consistent with state policy. Neither case supports the proposition that, absent formal state compulsion, actions taken pursuant to a comprehensive state regulatory program may be the basis for finding a Sherman Act violation.

B. *The Fifth Circuit's Formulation of* Parker *Improperly Restricts State Regulatory Options by Elevating Compulsion from Its Proper Role as Evidence of State Policy to a Rigid Precondition for* Parker *Immunity.*

The Fifth Circuit based its conclusion that compulsion is a threshold requirement for *Parker* immunity in part upon the belief that, with respect to private parties, the first *Midcal* standard of a clearly articulated and affirmatively expressed state policy necessarily includes a compulsion requirement. The court wrote:

> In the context of private parties, the first *Midcal* standard makes sense only if it includes a compulsion requirement. This is because we do not see how a private party can carry out a clearly articulated and affirmatively expressed state policy when it is left to the private party to carry out that policy or not as he sees fit.

United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 539 (5th Cir. 1983) (Unit B).

As a matter of logic, the Fifth Circuit is wrong. Whether a state chooses to compel particular conduct is not dispositive of whether the state intends to displace competition in a particular area of commercial activity. While state compulsion of specific anticompetitive conduct may be evidence of state policy, the relevance of compulsion must be limited to that: evidence of state policy.

The Fifth Circuit also ignored the federalism principles embodied in *Parker* which permit states to rely on private initiative in implementing state policies. *See Parker v. Brown*, 317 U.S. at 352 (producer proposal of marketing plan); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (auto dealer objections triggered state review of new dealer locations).

Courts should be reluctant to infer from the Sherman Act a congressional intent to preempt a state's exercise of its regulatory power. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). States should be free to enlist private initiative, in both its competitive and anticompetitive manifestations, in the furtherance of important state policies. If a state determines that particular forms of anticompetitive conduct further state goals, it should be free to encourage and supervise such conduct to insure that the relevant goals actually are advanced without being forced to prohibit competition that might further the same or other state objectives. Competition among the states in the pursuit of diverse solutions to the questions of regulation and competition will permit the develop-

ment of solutions that maximize consumer welfare and the efficient allocation of resources.[4] *See* Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. of L. & Econ. 23 (1983) ("economic federalism" supports antitrust immunity for any conduct clearly authorized by a state so long as the economic and social costs of that conduct are borne by those who choose to locate or transact business within the state); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). To forbid states from utilizing anticompetitive conduct to accomplish state regulatory purposes unless they compel such conduct would stifle experimentation and undermine the cooperative approach to governance that is at the heart of our federal system.

As embodied in *Midcal*, the principles of *Parker* enable courts to detect private conduct masquerading as state action. The requirement of clear articulation and affirmative expression of the state's policy is sufficient to insure that the state's policy with respect to the challenged conduct is not neutral,[5]

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[4]If principles of federalism require the antitrust laws to yield to forthright state cartelization for the purpose of raising prices above competitive levels, *Parker*, and to a state's decision to deny entry to a profession regardless of its motive in doing so, *Hoover v. Ronwin*, 104 S. Ct. 1989, 1999 n.28 (1984), then surely those same principles support antitrust immunity for a state regulatory policy that impinges less upon antitrust policy by balancing competitive and anticompetitive forces to further state goals without regard to whether the state relies upon compulsory or voluntary anticompetitive conduct.

[5]*See Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

One explanation for the results in *Cantor* and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), is that the light bulb program was not perceived by the Court in *Cantor* as central to the state's concern with regulating electricity (428 U.S. at 584-85, 598, 605) while the regulations at issue in *Bates* directly concerned the state's valid regulatory concern with protecting the public from the unauthorized practice of law. 433 U.S. at 361-62.

While neutrality and the absence of state supervision properly were inferred in *Northern Securities*, which involved general and therefore neutral state corporation law, and in *Boulder*, which involved a broad "home rule" delegation of state power without any articulation of policy, it is submitted that neutrality and a lack of supervision were inferred

and that private conduct is not merely "prompted" by state policy.[6] Active state supervision insures that the state is not simply giving its blessing to anticompetitive private conduct,[7] and that the anticompetitive conduct actually serves to further the state's policies. The Fifth Circuit's further imposition of a threshold compulsion requirement serves only to limit states' regulatory options without furthering antitrust policy.

C. *Privately Owned Businesses Should be Subject to No Stricter Rules or Greater Exposure than Their Government-Sponsored Competitors.*

The Fifth Circuit's reasoning also would impair competition on the merits between private businesses and the proprietary activities of governmental bodies. Government entities, and especially municipalities, have long engaged in a wide variety of proprietary business activities. Cities today operate electric, gas, water, sewer and telephone utilities, bus and rail transit systems, recreational facilities, hospitals and a variety of other businesses. Many investor-owned utilities face competition from government-sponsored or publicly-owned counterparts. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). Antitrust law, however, should clearly distinguish essentially commercial activities from *regulatory* functions and should afford such commercial activities of government no greater freedom to act anticompetitively than is permitted their private competitors.[8] The goals of the antitrust

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improperly in *Cantor* in view of the ongoing obligation on the state public service commission to regulate the utility rates in accordance with the just and reasonable standard.

[6]*See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[7]*See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

[8]The Department of Justice has supported this distinction in testimony before Congress concerning a proposal to overrule in part this Court's decisions in *Lafayette* and *Boulder*. *See* Statement of J. Paul McGrath, Assistant Attorney General, Antitrust Division, Before the Committee on the Judiciary, United States Senate, Concerning S. 1578, the "Local

laws would not be furthered by an immunity doctrine that confers artificial advantages on one set of competitors.

The Fifth Circuit concluded that this Court's formulation of the *Parker* doctrine in *Midcal* applied only to anticompetitive conduct of governmental parties. In the Fifth Circuit's view, this Court's decisions establish that the actions of a governmental entity, such as a municipality, are immune from antitrust scrutiny so long as they are pursuant to a clearly articulated and affirmatively expressed state policy and are actively supervised by the state,[9] but a private party's conduct is not immunized unless, in addition, it is formally compelled by the state. EEI submits that the *Midcal* formulation of *Parker* should apply to all businesses, whether publicly or privately owned and that the application of different federal antitrust standards to governmental and private actors ignores economic realities and is inconsistent with the policies of the antitrust laws. No stricter *Parker* test should apply to private businesses than was applied in *Midcal*.[10]

A majority of the Court has recognized that abuse of economic power by public bodies has consequences which are potentially as severe as those associated with the abuse of private economic power.

> Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a

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Government Antitrust Act of 1985," at 6 (April 24, 1984); *id.* at 10 (proposing amendment to bill in order "clearly [to] distinguish a local government policy decision to establish [a municipal electric] utility on a monopoly basis (and the competitive consequences of that decision) from purely commercial conduct by the utility that is unrelated to that policy decision").

[9]The Seventh Circuit has gone further and determined that state supervision of the anticompetitive activities of a municipality is not required for *Parker* immunity. *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984).

[10]Should this Court apply a more lenient standard for *Parker* immunity to the commercial activities of municipalities such as the city in *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3891 (U.S. June 11, 1984), then the same standard should apply to the private competitors of such municipalities.

> municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 403 (1978).

> When [local governments] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.

Id. at 408. Indeed, the Chief Justice characterized the dispute between the municipalities and the investor-owned utility in *Lafayette* as "an ordinary dispute among competitors" and noted that there was no real difference between the cities and any other entrepreneur in the economic community. *Id.* at 419 (Burger, C. J., concurring).

In *Lafayette* this Court soundly rejected the cities' argument that they should be permitted to invoke the antitrust laws "to complain of . . . economic damage while baldly asserting that any similar harms they might unleash upon competitors or the economy are absolutely beyond the purview of federal law." *Id.* The Fifth Circuit's conclusion that private conduct is immune from antitrust liability only if compelled by the state, but that proprietary activities of government may be immune in the absence of compulsion, while not as extreme as the position of the cities in *Lafayette*, would lead to the creation of a serious competitive imbalance between municipal and private competitors.

Also, most municipal utilities are not subject to review and

supervision by state regulatory agencies.[11] While both investor-owned and municipal utilities ultimately are responsible to state legislatures, investor-owned utilities are subject to ever-present institutional supervision which often is lacking over their municipal counterparts. If the compulsion requirement is necessary to assure that particular conduct actually was that of the state acting as sovereign, 702 F.2d at 540-41 n.16, it is ironic that the decision below suggests that municipalities, which are in a sense less accountable to the state than their private counterparts, are to be tested according to a more lenient standard.

The *Parker* doctrine is grounded upon principles of federalism and the belief that Congress did not intend to restrict the activities of states as sovereigns. Yet concerns of federalism and state sovereignty do not support or justify the double standard for *Parker* immunity adopted by the Fifth Circuit. To the extent that government entities such as municipalities compete with private entities, their business decisions should be scrutinized according to the same standard as their private counterparts.

D. *The Decision Below Fails to Give Due Weight to State Regulatory Decisions and Conceals a Substantive Evaluation of State Policy Behind the Erection of a Requirement of Form.*

The Fifth Circuit's compulsion requirement reflects an unwarranted distrust of states and their agencies. In concluding that state supervision is not adequate to insure that state-sanctioned anticompetitive conduct furthers state interests rather than purely private purposes, the court of appeals in effect said

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[11] *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 404 n.27 (1978) ("municipally owned utilities [in Louisiana] are not subject to the jurisdiction of the [Louisiana Public Utilities Commission] and hence apparently need not conform their expansion policies to whatever plans the PUC might deem advisable for coordinating service"). *See also* C. F. Phillips, The Regulation of Public Utilities 118 (1984).

that federal antitrust intervention into state administrative processes is necessary to assure that those processes function properly. The court below stated: "[i]f a state wishes to displace federal antitrust laws, it should be permitted to do so only if it speaks in the clearest and strongest possible terms." 702 F.2d at 542. This view unnecessarily restricts the ability of state regulatory bodies to administer state programs.

The Fifth Circuit's version of *Parker* reflects an approach which has been criticized because it assumes that "all forms of state regulation, which are not compatible with the precepts of a competitive order, are regarded as alien intruders into the domain of free competition even though they may be satisfactory surrogate methods of social control." Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 Colum. L. Rev. 1, 3 (1976). Yet government regulation of the economy has deep roots.[12] *See generally id.* at 3-7. State regulation long predates the Sherman Act, and, as *Parker* recognized, there is no indication that Congress in enacting the antitrust laws intended to invalidate or to eviscerate such regulation by the imposition of formal procedural requirements. Given the long history of government regulation of the econ-

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[12]Even at the height of economic substantive due process review of state statutes, many forms of state regulatory action were upheld. *Id.* at 5 n.23. Professor Handler identifies the following examples of state regulatory programs that were upheld against an economic substantive due process attack:

> *Budd v. New York*, 143 U.S. 517 (1892) (rates for weighing and handling of grain); *Brass v. Staeser*, 153 U.S. 391 (1894) (rates for storage and handling of grain); *Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884) (water rates); *San Diego Land & Town Co. v. National City*, 174 U.S. 739 (1899) (water rates); *Van Dyke v. Geary*, 244 U.S. 39 (1917) (water rates); *Producers Transportation Co. v. Railroad Commission*, 251 U.S. 228 (1920) (pipeline rates); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921) (rent control); *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389 (1914) (rates for fire insurance); *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, 282 U.S. 251 (1931) (commissions of insurance agents); *Stephenson v. Binford*, 287 U.S. 251 (1932) (rates for private carriers).

omy, a state's considered judgment that the encouragement and supervision of particular anticompetitive conduct will most appropriately advance an important state policy should not be overturned lightly.[13] This Court recognized as early as *Olsen v. Smith*, 195 U.S. 332 (1904) that broad application of antitrust policy to invalidate anticompetitive state regulatory programs would undercut altogether the ability of states to regulate economic activity and would significantly impair states' ability to legislate on matters of health, safety and welfare. *Id.* at 344-45 ("The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate. . . .").

The Fifth Circuit deemed irrelevant concerns that its holding would undermine the ability of state regulators to perform their regulatory functions. 702 F.2d at 542. According to the court, these objections "amount to the argument that competition does not work well, so the antitrust laws should not apply." *Id.* (citing *National Society of Professional Engineers v. United States*, 436 U.S. 679 (1978)). The teaching of *Professional Engineers*, however, is inapplicable to the states. This Court has emphasized that "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) (footnote omitted). In contrast to the court below, the *Parker* doctrine trusts states to balance competitive values with other state policies and to utilize private conduct in that balancing process as the states may determine.

EEI is concerned that a substantive judgment concerning

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[13] "[A]n anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed." *Cantor*, 428 U.S. at 611 (Blackmun, J., concurring).

the merits of the underlying activity in this case, collective ratemaking, lies behind the Fifth Circuit's reliance upon the absence of compulsion and that such a judgment may influence the contours of the *Parker* doctrine announced herein in a manner which needlessly impairs other activities undertaken pursuant to state regulatory programs. The Fifth Circuit's action is close to the kind of substantive review of state regulatory programs that began with *Lochner v. New York*, 198 U.S. 45 (1905), and was deservedly repudiated in *Nebbia v. New York*, 291 U.S. 502 (1934).

If this Court determines that the Sherman Act requires substantive review of state policies, it should articulate an approach that accounts for the lessons of the economic substantive due process era. To follow the path taken by the Fifth Circuit would invite courts covertly to review the substance of state policy while purporting only to consider whether it is stated with sufficient clarity, whether the form of its expression is sufficiently compulsory, and whether state supervision is sufficiently active. Unless the Court intends to engage in substantive review of state policies, it should be sufficient for *Parker* immunity that anticompetitive conduct is pursuant to a duly adopted state regulatory program and that the state is sufficiently involved to insure that private conduct furthers the state's interests and that the state is not simply giving its approval to essentially unrestricted private activity.

II. The Right to Petition Is Essential to the Regulatory Process and Was Not Properly Considered by the Decision Below.

The decisions below erred in holding that the group formulation of proposed tariffs is not covered by the *Noerr-Pennington* doctrine. *See* 672 F.2d at 476-77 (panel decision); 467 F. Supp. at 484-85 (district court decision). The Justice Department, the district court and the court of appeals each segregated the formulation of the proposed tariff from the proposal itself to avoid the appearance of raising *Noerr-Pennington*

and *Parker* concerns. Yet all parties agree that the proposal itself is protected petitioning activity. *See* 672 F.2d at 477; 467 F. Supp. at 484.

EEI submits that *Noerr-Pennington* protection of proposals for state agency action requires protection for their formulation. In *Noerr*, a joint agreement among the railroad presidents to seek anticompetitive legislation and to engage in a similar advertising campaign was not condemned as having significance independent of the activities themselves. The Court wrote:

> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint. . . . [S]uch associations . . . bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom . . . through the use of such devices as price-fixing agreements.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

The First Amendment principles embodied in the *Noerr* case demand linkage of a proposal for regulatory action with the formulation of the proposal. *See id.* at 137-38 (right to petition limits Sherman Act). "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *See also Claiborne Hardware* 458 U.S. at 913-14 (discussing *Noerr*); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (right of association undeniably enhances right to petition); *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

The district court initially recognized that the process of formulating proposals for government action is protected speech for First Amendment purposes:

> The First Amendment principles underlying *Noerr-Pennington* are nevertheless applicable by analogy. If the defendants may, in exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

467 F. Supp. at 485. *See also Horsemen's Benevolent & Protective Association v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098, 1110 (E.D. Pa.), *aff'd w/o opinion*, 688 F.2d 821 (3d Cir. 1982) (*Noerr-Pennington* applies to the formulation and presentation of jockey fee schedules to the state horse racing commission).

However, the district court and the court of appeals justified independent significance for the formulation process in the belief that "the industry's participation in the [ratemaking] process surpasses mere petitioning and renders the industry, in part, a decisionmaker." 467 F. Supp. at 485. In this posture, collective formulation became collective ratemaking. *See id.* (citing *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593-94, 601-02 (1976) (Opinion of Stevens, J.)). Such a rationale, if allowed to stand, would undermine the right to petition. Every successful petitioner of government would have the state's acts imputed to him, regardless of his actual responsibility for the policy. Such a construction of the *Noerr* doctrine would work against the doctrine's purpose of encouraging petitioning activity. In this case, the courts' justification is also inapplicable because all parties agree that each state actively supervises the ratemaking process. 702 F.2d at 539. Justice Stevens' comments in *Cantor*, 428 U.S. at 584-85, about passive governmental acceptance of light bulb tariffs thus have no application here. Moreover, the district court's reasoning overlooks the fact that since the tariff in *Cantor* was in effect prior to the existence of state regulation, *id.* at 599-600, no *Noerr-Pennington* issue was raised by that case.

Again, EEI is not supporting the merits of collective ratemaking. Special considerations may attach to collaborations among competitors concerning price that may, in some circumstances, justify injunctive relief based on a theory that the defendants have agreed to stabilize prices[14] or have restrained trade by agreeing to forego the freedom to price unilaterally[15] where an agreement separate from an agreement to collaborate in forming a petition may be inferred from otherwise protected activity.

EEI is concerned that the Fifth Circuit's decision will deter the formulation and presentation of proposals for administrative action, especially those that are subject to regulatory supervision and review by governmental decision-makers. If affirmed, the decisions below mistakenly would risk subjecting all collaborations to formulate petitions for relief to state agencies to attack as "independently cognizable" agreements in restraint of trade.

---

[14]*United States v. Container Corporation of America*, 393 U.S. 333 (1969), reversed a district court's refusal to enjoin an agreement among members of a trade association to exchange price information. The government had alleged that the purpose of the agreement to provide price information was to chill competition and had conceded that a simple agreement to provide information would not be actionable. The district court found that in fact there had been variations in price which contradicted the inference of a purpose or effect to chill competition. The Court disagreed with that ruling, finding instead that the evidence showed that the agreement facilitated oligopolistic pricing within a narrow band of variation. Although acknowledging that *Container Corporation* did not involve an agreement to adhere to particular prices as had existed in *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936), or *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Court found that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." 393 U.S. at 338 (footnote omitted).

[15]At common law an association formed to present a joint bid at a public auction was an agreement in restraint of trade because of the agreement, express or implied, to forego unilateral action. *Kearney v. Taylor*, 56 U.S. (15 How.) 494 (1853). The petition in *Georgia v. Pennsylvania Railroad*, 324 U.S. 439 (1945), relied on by the Justice Department also alleged an agreement to refrain from unilateral action.

III. Conclusion.

In the final analysis, the First Amendment and federalism issues in this case are related because of the deleterious impact of both the rigid formulations of the *Parker* doctrine and the artificially simplified models of state regulation effectively adopted by the decision below upon the ability of regulators and regulated industries to function. For the foregoing reasons the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 1984, three copies of the above Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* in Support of Reversal have been served on the parties of record via United States mail, first-class, postage prepaid and properly addressed as follows:

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MOTION FILED

SEP 16 1984

No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit (Unit B)

MOTION OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC. and
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit (Unit B)

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Small Shipments Traffic Conference and the Drug and Toilet Preparation Traffic Conference (hereinafter collectively "Shipper Conferences") hereby respectfully move for leave to file the attached brief supporting affirmance. This motion is necessitated by the refusal of Petitioners to consent to the filing of this brief.

These Shipper Conferences are non-profit membership corporations which have for many years represented their members before the Interstate Commerce Commission, various state commissions and in the courts with

respect to transportation issues. Conference officials have also testified before Congress and state legislatures on transportation subjects. Both Conferences represent their members, which range from private individuals to major corporations, in their capacities as shippers of freight, with special emphasis on members' interests as shippers via regulated motor carriers. The National Small Shipments Traffic Conference focuses in its activities on issues affecting small or less-than-truckload (LTL) shipments, a segment of the transportation market which is dominated by large carriers with terminal facilities. The Drug and Toilet Preparation Traffic Conference represents most of the major shippers of drugs, medicines and toilet articles.

The interest of these Shipper Conferences in the instant case is not academic or indirect. Members of these Conferences are in the front lines of the controversy presented herein, in that, as consumers of transportation services, they must pay the collectively set intrastate freight rates which have been found to violate the antitrust laws. As representatives of the public victims of the intrastate freight rate price fixing which petitioners seek to immunize, these Conferences bring to this case a perspective which is shared by no other party and by no known *amicus*.

Through the attached brief, these Shipper Conferences seek to present to the Court new facts and arguments relating to the antitrust immunity issues, including the public policy context in which this case should be considered. For example, it has been suggested that collective ratemaking is in the public interest, although the asserted benefits are more in the nature of the enhanced convenience for rate retrieval than reduced rates for the shipping public. See Brief of Petitioner SMCRC at p. 37.

These Conferences' members include many transportation professionals who have actually participated as shippers' representatives in public meetings sponsored by the Petitioner rate bureaus. These Conferences, which represent active members of the shipping public, are firmly opposed to antitrust immunity for intrastate collective ratemaking. In our view, state commissions too often "rubber stamp" general increases of intrastate freight rates which have been collectively set by motor carriers.

Nor is our opposition limited to collective ratemaking in intrastate commerce. Judge Clark, in his dissent below, criticized the Respondent for opposing in intrastate commerce an activity which is permitted in interstate commerce. However, there have been significant developments reducing the ability of motor carriers to set interstate freight rates collectively, and these Shipper Conferences are in the forefront of efforts to eliminate what remains of antitrust immunity for interstate collective ratemaking. This Court should be aware of these developments in considering this important case.

Wherefore, these Shipper Conferences move that the attached *amici brief* be accepted for filing by this Court.

Respectfully submitted,

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SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit (Unit B)

BRIEF *AMICI CURIAE* NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE IN SUPPORT OF AFFIRMANCE

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BRIEF *AMICI CURIAE*

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE IN SUPPORT OF AFFIRMANCE

INTEREST OF *AMICI CURIAE*

The members of *amicus*, the National Small Shipments Traffic Conference, include individuals, small companies and major corporations which ship millions of tons of freight by motor carriers each year. The Conference is a shipper-member association, with special emphasis on shipments in small or less-than-truckload (LTL) quantities. *Amicus*, the Drug and Toilet Preparation Traffic Conference, includes most major manufacturers of drugs, medicines and toiletries. They participate in the Conference in their capacity as shippers of freight. Members of both Shipper Conferences are a cross-section of those who ship freight by motor carrier members of the rate bureau petitioners in this case and pay collectively set intrastate freight rates.

The rate bureau petitioners do not deny that collective intrastate ratemaking by motor carriers constitutes price fixing which would violate the antitrust laws in the absence of immunity from the application of these laws. As a result of this price fixing, the rate bureau petitioners and their motor carrier members charge the public, including members of these Shipper Conferences, higher intrastate freight rates than would be set by motor carriers acting independently of one another. Continued antitrust immunity for such price fixing is not justified by considerations of law or policy. These Shipper Conferences have long opposed antitrust immunity for collective motor carrier ratemaking in interstate as well as intrastate commerce, and urge this Court to affirm the decision of the court of appeals below.

Amici wish to make it clear that their arguments arise in the regulatory context of this case, and that certain legal and policy positions espoused here may not be equally applicable to situations involving state regulation of industries other than motor carrier transportation, as discussed in the brief of *amicus curiae* Edison Electric Institute.

SUMMARY OF ARGUMENT

These Shipper Conferences file this brief as *amici curiae* to support affirmance of the decision below. As customers of the trucking companies, they are opposed to collective ratemaking because such rates are generally higher than individually made rates and tend to chill individual ratemaking.

The scheme of intrastate ratemaking under review allows carriers at their option to join rate bureaus and thereby to make rates collectively. They are neither bound to join the bureau nor to adhere to the bureau-set rates, inasmuch as they have the right to publish other rates individually.

Whether or not *Parker* v. *Brown*, 317 U.S. 341 (1943) and successor cases can be read as extending antitrust immunity only to activities directed by "compulsory" state action, there is simply not enough here to warrant raising the shield of antitrust immunity for what is concededly price-fixing in violation of the antitrust laws. The state does not require that the carriers join the rate bureau, nor does it require the carriers to abide by the rate bureau's rates. And, although the state commission later reviews and approves the rates as not being unreasonable, this limited approval after-the-fact does not retroactively confer antitrust immunity. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

A *caveat* is important here. While the narrow question before the Court is whether the state statutory scheme in place creates an antitrust immunity, the truckers are already pressing for new "mandatory" state legislation to vitiate the effect of the decision below. But the requirement of mandatory state action does not mean that all rates in the state would have to be made collectively. For ratemaking to attain antitrust immunity, a state has the option of mandating that only certain rates be made collectively. For example, new state legislation meeting the *Parker* test could provide only that the carriers would be required to join rate bureaus to set the maximum rates to be charged. All other rates could still be made by carriers individually outside the collective ratemaking forum. Thus, the carriers would be left free to exercise their managerial discretion to publish lower individual rates or discounts. This option is essential, or else the shippers in the future would be faced with higher rates and less competition than is available under the present intrastate scheme where collectively made rates and individually made rates are available.

ARGUMENT

I. The State Action Doctrine Does Not Immunize Collective Intrastate Motor Carrier Ratemaking

In *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. Unit B 1983), the United States Court of Appeals, sitting *en banc*, rejected the argument of the rate bureaus that the state action doctrine immunizes collective intrastate motor carrier ratemaking from the application of the antitrust laws. The court noted that, while the laws of Mississippi, Alabama, Georgia, Tennessee and North Carolina permit motor carriers to discuss and agree on the intrastate

freight rates they will charge—an activity which is now conceded to amount to price fixing in violation of the antitrust laws, unless immunized under the state action or *Noerr-Pennington* doctrines[1]—motor carriers in those states retain express permission *not* to engage in price fixing.

In light of such optional rate-setting action, the court held that the exercise of preclusive state sovereignty necessary to prevent application of the federal antitrust laws was absent. The court adopted (702 F.2d at 542) the decision of a panel of the court, 672 F.2d 469, 476-81, rejecting the petitioners' *Noerr-Pennington* and Sherman Act arguments, and affirmed the decision of the district court[2] granting the Government's motion for an injunction against continued intrastate collective ratemaking by the rate bureaus in violation of the antitrust laws.

Before turning to a discussion of the court's decision on the state action issue, there are two issues important to the state action analysis which were not decided by the court. First, the court of appeals voted to rehear the case *en banc* to consider two issues. The first was "whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions," and the second was "whether, if state compulsion is not necessary, the state

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[1] The leading cases establishing the *Noerr-Pennington* doctrine are *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).

[2] *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471 (N.D. Ga. 1979), reprinted in Petition for Certiorari, Appendix (hereinafter "Pet. App.") at 1a.

policies at issue here were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply." 702 F.2d at 534. Since the court decided that state compulsion is necessary, it did not reach the second issue. While we believe the compulsion question was correctly decided, we would point out that, if this Court holds otherwise, the result should be a remand to consider the issue not reached by the court of appeals.

It should be noted next that the Government, before the court of appeals, agreed with the rate bureaus that each state actively supervises the collective ratemaking process. The court of appeals, therefore, did not examine whether this part of the two-part test established by this Court in *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) had been met. While we support the position of the Government here in most respects, we disagree with the Government's suggestion that there is adequate state supervision of intrastate collective ratemaking. Therefore, it is the position of these Shipper Conferences that collective intrastate ratemaking would not be immune from the antitrust laws even if the states in question were to change their laws to compel collective ratemaking.[3]

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[3] In this regard, there are signs of a backlash in some states against the court of appeals' decision here. Carriers in a number of states, sometimes with the support of state regulatory agencies, are seeking changes in state law which would go so far as to eliminate any right of independent action by motor carriers, thus compelling all carriers to charge only rate bureau-set rates. These Shipper Conferences view this development with grave concern, since, in our view, independent action filings produce some limited moderation of the adverse economic impacts of collective ratemaking. Indeed, such legislative proposals go far beyond the reach of *Parker*, as the states have the option of mandating that the carriers' maximum rates be set in bureaus, leaving the carriers free to set lower rates individually.

The decision of the court of appeals was not unanimous. Judge Hill, in a lengthy opinion, dissented from the majority's decision on the state action issue. Judge Clark, one of the judges who joined Judge Hill's state action dissent, also criticized the Justice Department for inconsistency in challenging intrastate collective ratemaking, in view of the fact that interstate collective ratemaking remains lawful. (As will be seen, Judge Clark's criticism is not well taken, since the Justice Department is in fact advocating the end of all collective interstate ratemaking by motor carriers.) However, these dissents were limited to the majority's position on the state action issue. No judge dissented from the majority's rejection of the arguments that collective intrastate ratemaking is immunized under the *Noerr-Pennington* doctrine or that such ratemaking does not violate the Sherman Act (an argument which has evidently been abandoned by petitioners in this Court).

Moreover, even in his dissent on the state action issue, Judge Hill had no kind words for the existence of a state action exemption to federal antitrust law (702 F.2d at 542), and he went on to make the following concession:

> The principal flaw in the majority's position is not that it misinterprets the line of cases developing the doctrine of state action immunity. The court's analysis leading to its conclusion that compulsion is an essential element of immunity for a private defendant certainly is plausible. (702 F.2d at 543)

Indeed, as to only three of the five states in question did Judge Hill express the belief that antitrust immunity should be found, even under his interpretation of the state action doctrine. 702 F.2d at 548.

Judge Hill's dissent turned on his disagreement with the majority's interpretation of *Midcal*, *supra*, which he

described as "presumptuous at worst, and unsound policy as it pertains to the facts of this case at best" (702 F.2d at 542).

Judge Hill does not deny the potential significance of state compulsion of private behavior for purposes of state action analysis. The essence of his disagreement with the majority is his belief, based on his reading of *Midcal*, that compulsion, by itself, is neither "necessary nor sufficient" for state action immunity. 702 F.2d at 544, quoting Areeda, Antritrust Law ¶ 212.5 at 62 (Supp. 1982).

Midcal involved a California program under which wine producers and wholesalers were required by statute to file price schedules or fair trade contracts, and were prohibited from charging prices other than those set forth in those schedules and contracts. In its decision in *Midcal*, this Court reviewed its earlier decisions establishing and developing the state action doctrine, beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), and concluded:

> These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," second, the policy must be "actively supervised" by the State itself. (445 U.S. at 105, citations omitted.)

The Court went on to hold that while the California program met the first test for antitrust immunity, the second requirement, "active state supervision," was not present, and state action immunity was therefore denied. In comments which apply equally well to this case, the Court said "The State simply authorizes price setting and enforces the prices established by private parties" (445 U.S. at 105), and observed that "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." (445 U.S. at 106.)

Since state compulsion was present in *Midcal*, state action immunity was denied on the grounds that compulsion is not *sufficient*, by itself, to immunize "what is essentially a private price-fixing arrangement."[4] Thus even a compulsory program of intrastate collective motor carrier ratemaking would be vulnerable to antitrust challenge on similar grounds.

However, there is no support in this Court's *Midcal* decision for Judge Hill's statement that state compulsion is not *necessary* to immunize private price fixing under the state action doctrine. It is true that the Court's two-part test does not explicitly mention compulsion, but *Midcal* arose out of an action brought to enjoin the State of California from enforcing its statutes, and did not involve a challenge to voluntary price-fixing by private parties under a permissive arrangement, as the instant case does.

The significance of this distinction was illustrated in this Court's recent decision in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. 1989 (1984), in which the disagreement between the majority and the dissent turned on whether the real party in interest was the Arizona Supreme Court or that court's agent, the Committee on Examinations and Admissions. The decision in *Hoover* v. *Ronwin* makes it clear that the *Midcal* test is not of universal applicability. The Court held that "Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear

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[4] See also *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), in which state action immunity for Detroit Edison's free light bulb program was denied even though that program was embodied in Detroit Edison's tariffs, with which the utility was required by state law to comply.

articulation' and 'active supervision' " (104 S.Ct. at 1996). On the other hand,

> in cases involving the anti-competitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. *Boulder*, *supra*, at 54, 102 S.Ct., at 842. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See *Midcal Aluminum*, *supra*, at 105, 100 S.Ct., at 943; *Goldfarb*, *supra*, at 791, 95 S.Ct., at 2015. (104 S.Ct. at 1995).

Although the Court did not go so far, the next stop in the progression from sovereign act by the state itself (as in *Hoover* v. *Ronwin*) to "anti-competitive conduct of a non-sovereign state representative" (as in *Midcal*), would be anticompetitive conduct engaged in by private parties. Where, as here, (1) such conduct is engaged in or not at the option of the private parties under a permissive regulatory arrangement and (2) where there is no indication that the "state legislature or supreme court supervises its representative," (*i.e.*, the state commissions which oversee this permissive arrangement), it is difficult to believe that the state action doctrine could be found to apply.

As the majority decision of the court of appeals in this case points out, the two-part test in *Midcal* must be interpreted in light of the facts of the *Midcal* case itself, and in light of the prior state action decisions of this Court from which the *Midcal* test was developed. The court of appeals majority explains at length and in persuasive detail why a requirement of compulsion for state immunization of private action from the antitrust laws is

consistent with *Midcal* and flows naturally from the decisions of this Court leading up to *Midcal*. See 702 F.2d at 538-41.

Indeed, a key question confronting Judge Hill (and other parties who argue that state compulsion is not only not sufficient but is not necessary) is whether, in any decision of this Court which found state action immunity applicable to a nonsovereign act by a state agency or subdivision or a private party, compulsion was absent? If so, it might be argued that compulsion is not a necessary component of the state action doctrine.

No such cases are cited by Judge Hill in his dissent, or by the rate bureau petitioners or petitioner National Association of Regulatory Utility Commissioners in their briefs, and none exist. Of this Court's cases developing the state action doctrine, only three decisions (other than *Hoover* v. *Ronwin*, discussed above) found the challenged behavior to be immunized under the state action doctrine. In all three cases—*Parker* v. *Brown*, *supra*, which concerned a mandatory prorate program imposed on growers by the State of California, *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), which involved a prohibition by the Arizona Supreme Court against lawyer advertising, and *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), involving the requirement of California state approval for new automobile dealerships—compulsion was in fact present.

Reduced to their essence, the state statutes in the instant case provide the alternatives that carriers may either make rates collectively or they may choose to make rates individually without such collusion. A state could enact a similar statute covering all pricing by all companies in all industries in the state. Can a state so simply repeal the federal antitrust laws from application within its boundaries? We think not.

II. The *Noerr-Pennington* Doctrine Does Not Immunize Collective Intrastate Motor Carrier Ratemaking

The *Noerr-Pennington* arguments of the petitioners require little in the way of a response. In the original district court decision in this case, the court stated "The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors" (467 F.Supp. at 485). Now, many briefs later, the petitioners have still cited no such cases. Precedent and policy are against petitioners' *Noerr-Pennington* arguments.

Moreover, *Georgia* v. *Pennsylvania R. R.*, 324 U.S. 439 (1945) is squarely against petitioners on this point. In that case, this Court held collective interstate ratemaking by railroads to be price-fixing in violation of the antitrust laws, in spite of the fact that the rates were reviewed and approved by the Interstate Commerce Commission.

III. Policy Considerations Do Not Favor Immunity For Collective Intrastate Motor Carrier Ratemaking

It cannot be denied that the policies furthered by the antitrust laws—economic efficiency and prices set by competition in the marketplace—are important ones. The influence of the antitrust laws is pervasive. In the event of a conflict between those laws and other federal laws, the antitrust laws give way only if Congress clearly and unequivocally expressed such an intention. Repeals by implication are not favored. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973).

Moreover, it has never been suggested that the price-fixing in which motor carriers engage under the auspices of the rate bureau petitioners is intended to set low or minimal uniform rates. The experience of these Shipper

Conferences is that when rates are published by individual carriers acting independently of the rate bureaus, those rates are almost always *lower* than the collectively set rate for similar service. It is our firm belief that, if collective intrastate ratemaking were abolished, freight rates charged by motor carriers to the shipping public would come down. This belief finds support in a survey of the results of the first year of intrastate motor carrier deregulation in Florida. See Freeman, A Survey of Motor Carrier Deregulation in Florida: One Year's Experience, ICC Practitioners' Journal, Nov-Dec. 1982.

Congress clearly agrees that the benefits of collective motor carrier ratemaking warrant reexamination. To this end, Congress established, in the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, a Motor Carrier Ratemaking Study Commission, and ordered it to "make a full and complete investigation and study of the collective ratemaking process for all rates of motor common carriers and upon the need or lack of need for continued antitrust immunity therefor" (Motor Carrier Act of 1980, Section 14(b)(2), 94 Stat. 806). These Shipper Conferences, along with many other parties, presented testimony before the Commission. In its report entitled Collective Ratemaking in the Trucking Industry, submitted June 1, 1983, the Motor Carrier Ratemaking Study Commission recommended to Congress the complete abolition of antitrust immunity for collective motor carrier ratemaking of interstate rates.

Although this recommendation has not yet been implemented in full, the Motor Carrier Act of 1980 itself provided for a major reduction in antitrust immunity for collective interstate ratemaking. Section 14(b)(3)(D) of the Motor Carrier Act amended the Interstate Commerce Act so as to eliminate, with certain exceptions, antitrust immunity for collective ratemaking as to single-

line rates (*i.e.*, rates applicable to movements in which the transportation from origin to destination is provided by a single motor carrier) effective July 1, 1983. See 49 U.S.C. § 10706(b)(3)(D).

Thus, partial withdrawal of antitrust immunity for interstate ratemaking has already taken place; and the complete withdrawal of antitrust immunity for collective interstate ratemaking is only a matter of time. Events have already overtaken the separate dissent of Judge Clark to the decision of the majority of the court of appeals in this case. In that dissent, he complained that petitioner Southern Motor Carriers Rate Conference could publish collectively set rates with the ICC for movements of carpet from Rome, Georgia, to Nashville, Tennessee, but would not be able, under the majority's interpretation of the law, to publish collectively set intrastate rates for movements from Rome, Georgia, to Macon, Georgia, approximately the same distance. 702 F.2d at 548-49. Assuming the rates in question are single line rates (as shorthaul shipments are usually single line), they may no longer be collectively set for the interstate movement.

What public policies have been cited in support of antitrust immunity for collective intrastate ratemaking, in the face of the foregoing arguments against antitrust immunity?

Petitioner Southern Motor Carriers Rate Conference contends (brief at 34-35) that "The States have defended their regulatory programs because these programs could not handle the flood of independent actions which the Final Judgment herein would create." This is belied by the fact that there are literally thousands of individual carriers' tariffs filed with the Interstate Commerce Commission. If it can handle such a "flood" of tariffs covering

the continental United States, then a state agency can easily handle the independent tariff filings of local carriers.

It is also contended by petitioners that the compulsion test eliminates the last element of competition—independent action filings—from intrastate ratemaking. See Brief of petitioner National Association of Regulatory Utility Commissioners at p. 9, and Judge Hill's dissent below, 702 F.2d at 546. We have expressed our concern over this possibility. It is the expectation of these Shipper Conferences that if the state-compulsion requirement forces the states to reconsider their policies on collective intrastate ratemaking, most states will follow the federal trend away from antitrust immunity. In any event, this Court should make it clear in its opinion that if state-mandated collectively-made rates are to be immunized, then carriers may be left free to publish individual discount tariff items. In other words, state-mandated collectively set rates can coexist alongside individual carrier-made rates which are not collectively set.[5]

IV. Conclusion

Immunity from the antitrust laws should not be extended lightly. The policy behind the laws is to preserve the benefits of free competition. The limited state action present in this case simply does not warrant an immunity from the antitrust laws. The states neither initiate the

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[5] A state which sets mandatory prices on raisins may elect not to set the prices of oranges. By the same token, a state may elect to mandate collective ratemaking on the maximum rates carriers may charge, while simultaneously allowing carriers to publish individually their own competitive rates or discounts.

bureau rates nor require that the carriers observe them.[6] Thus, the carriers have not been placed in the classic position, between a rock and a hard place, which would warrant extricating them by a grant of immunity. They can extricate themselves simply by staying out of the rate bureau and, therefore, can choose not to violate the anti-trust laws. For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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[6] Based upon the part of the North Carolina Public Utilities Act shown at page 2 of Petitioners brief, *viz.*, Section 62-152.1(b), it might be inferred that the rate bureau proposes a set of rates which is then "fixed" by the Commission as the single uniform set of rates throughout the state. However, Subsection (e) of Section 62-152.1 provides that any carrier in a rate bureau may publish its own rates by "independent action" after the rate bureau sets rates for the group. And there are many such rates in effect today.

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No. 82-1922

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE
CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS
ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF FOR THE STATE OF IOWA AND THE STATES OF WISCONSIN, DELAWARE, RHODE ISLAND, AND INDIANA

IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioners' collective rate-making and collective rate-publication activities are immunized from antitrust liability by the state action doctrine.

2. Whether the Petitioners' collective rate-making and collective rate-publication activities are protected from antitrust liability by the Noerr-Pennington doctrine.

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IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity of Amici States.

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states with responsibility for the enforcement of the state and federal antitrust laws in their jurisdictions. In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens. (15 U.S.C. § 4c)

B. Interest of the Amici States in This Case.

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and this Court's numerous pronouncements with

respect thereto. Moreover, the states' antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[1]

The State of Iowa, in particular, has filed a similar action[2] opposing collective rate-making before the Iowa Transportation Regulatory Authority which action is pending and awaiting the outcome of this decision.

For these reasons and for the reasons more fully set forth herein, the Amici States

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[1] See, e.g., People v. Northern Avenue Furniture & Appliance, 645 P.2d 129 (Colo. 1982); Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982); Grams v. Boss, 97 Wisc.2d 332, 294 N.W.2d 473 (Wisc. 1980); Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P.2d 833 (Cal. 1976); State v. Readers Digest Assoc., 81 Wash.2d 259, 501 P.2d 290 (1972); Pittsburg Plate Glass Co. v. Paine & Nixon Co., 234 N.W.2d 453 (Minn. 1931).

[2] General Counsel, Transportation Regulation Board and State of Iowa v. Iowa Movers and Warehousemen's Association and Motor Truck Operator Members of Iowa Movers and Warehousemen's Association, Iowa Transportation Regulation Authority, Docket No. MV-I-79-12.

oppose the contentions of the petitioners and the contentions of any Amici supporting petitioners' position that their collective rate-making and collective rate-publication activities should be immunized from antitrust liability under the state action doctrine or protected from antitrust liability under the Noerr-Pennington doctrine. The proposed extension of the state action and Noerr-Pennington doctrines is inconsistent with this Court's precedents and runs afoul of juridically recognized state interests in effective enforcement of antitrust laws.

SUMMARY OF THE ARGUMENT

Collective rate-making is nothing more than price-fixing among the members of the petitioning rate bureaus. Georgia v. Pennsylvania R. Co., 324 U.S. 439, 458 (1945); United States v. Trans-Missouri Freight Association, 166 U.S. 290, 341-342 (1897); United States v. Joint Traffic Association, 171 U.S. 505, 565 (1898). A price-fixing conspiracy of the nature exhibited here is a naked restraint of trade and illegal per se. Without a cognizable state interest in compelling or authorizing such anticompetitive conduct, the federal antitrust laws should preempt any state laws authorizing or compelling such conduct. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

Even absent federal preemption petitioners' collective rate-making activities do not fit within the immunity from antitrust liability under the state action doctrine

because the petitioners' activities were not compelled by any state as required by Parker v. Brown, 317 U.S. 341 (1943) and its progeny nor has the respective state laws evidenced a clear purpose to displace the antitrust laws. Rather each state has permitted the private parties (member carriers) to decide if competition will be displaced or not by allowing each to determine if each will participate in the collective rate or not.

The Noerr-Pennington doctrine affords no protection for petitioners' anticompetitive collective rate-making activities. The petitioners' conspiracy (or anticompetitive behavior) occurred prior to any petitioning of the government and does not represent any traditional political action and, therefore, cannot be afforded any protection as political action under the Noerr-Pennington doctrine. The purposes of the Noerr-Pennington doctrine can be served without shielding petitioners' price-fixing conspiracy from the federal antitrust laws.

ARGUMENT

I. State Law Does Not Shield Anticompetitive Activity From Federal Antitrust Laws Under The Facts Of This Case.

Congress has enacted certain laws[3] which expressly provide for state law precedence over the federal antitrust laws. Petitioners point to no express provision of federal law establishing reverse preemption. Petitioners' state action immunity argument is based on the concept of federalism and implied, not express, immunity from the federal antitrust laws.

The states, however, cannot merely authorize or compel anticompetitive activity without federal preemption. For example, a state cannot compel all gasoline retailers in their state to arrive at a price for regular

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[3] See, e.g., Miller-Tydings Act of 1937, 50 Stat. 693 (1937), repealed, 89 Stat. 801 (1976); McCarran-Ferguson Act, 59 Stat. 33 (1945).

gasoline sales. No state interest is served by such a law and such would clearly be inapposite to the federal antitrust policy of free and open competition. Thus, the state law would be preempted by federal law through the Supremacy Clause (U.S. CONST. art. VI).[4]

Areeda and Turner discuss this concept of federal preemption in their treatise Areeda & Turner, I Antitrust Law ¶ 209 (1 ed. 1978) and conclude, "we see that federal preemption seems clear where the state, without supervising the private power it creates, attempts to authorize private parties to escape the strictures of the antitrust laws, to compel them to act in a manner forbidden by the antitrust laws, or to prevent them from competing in a manner clearly mandated by federal law." (at page 66).

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[4] See, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (test of preemption is whether the state law stands "as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress").

This position is supported by this Court's decisions in Lear v. Adkins, 395 U.S. 653 (1969); Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The latter decision would prevent states from enacting laws designed to prevent price competition. In Schwegmann Bros., the state of Louisiana enacted a law which required resale price maintenance by all retailers under a supplier if one retailer agreed to resale price maintenance with the supplier. The Miller-Tydings Act[5] exempted the signing retailers agreement from the federal antitrust laws but did not embrace the non-signer provision. That provision was held unenforceable.[6]

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[5] Supra note 3.

[6] Schwegmann Bros. at 395. Earlier Justice Douglas wrote, "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress" (at 386).

In this instance, the price-fixing activities of the petitioners are clearly at odds with the federal antitrust policy of free and open competition. The authorization of the price-fixing agreement, collective rate-making, by the states serves no cognizable state interest under the police powers reserved to the states. The only state interest served seems to be one of regulatory self-interest, i.e., to minimize the amount of work the state has to do in order to process the rate proposals submitted to the agency.[7]

Even if the state statutes in question here compelled or required the anticompetitive behavior (collective rate-making) such should be preempted by the federal anti-

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[7] See, e.g., the description of the "Regulatory Procedure," United States v. Southern Motor Carriers Rate Confer., Inc., 467 F.Supp. 471, 476-478 (N.D. Ga. 1979); United States v. Southern Motor Carriers Rate Conf., 702 F.2d 532, 542 (5th Cir., Unit B, 1983) ("They also assert that the ability of state regulators to perform their task will be undermined.").

trust laws due to the lack of any cognizable state interest which outweighs federal antitrust policy. Otherwise, this Court would be handing fifty separate sovereign states carte blanche to disrupt the federal policy of free and open competition as each saw fit.

II. The State Action Doctrine Has No Application Where Conspirators Engage In Non-Mandated Price-Fixing Prior To Submission Of Tariffs To A State Agency.

Petitioners argue that even if their collective rate-making activities violate federal antitrust laws such activities would be immune from antitrust liability under the state action doctrine. The state action doctrine was first articulated in Parker v. Brown, 317 U.S. 341 (1943). The Parker court found that, ". . . we think the present regulation is within state power." (at 360) and "Examination of the evidence in this case and of the available data of the raisin industry in California, of which we take judicial notice, leaves no doubt that the

evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries." (at 363). The Parker court found the necessary state interest to avoid federal preemption.

The Parker court prefaced its state action immunity by stating, "True a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347, 48 L.Ed. 679, 698, 703, 704 24 S.Ct. 436; and we have no question of the state or municipality becoming a participant in a private agreement or combination by others for restraint of trade (citations omitted)." (at 351-352). In analyzing the California prorate program the Parker court stated, "But it is plain that the prorate program here was never intended

to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command" (at 350)*** "The state in adopting and enforcing the prorate program made no contract or agreement in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." (at 352).

In this case, the petitioners were not commanded by any of the sovereign states to enter into collective rate-making agreements. The courts below all found the state regulatory statutes permissive in nature. Each individual carrier then had to decide whether to file an individual tariff or join others in filing a collective rate. No state commanded the petitioners to file collective rates nor imposed the restraint as an act of government upon them.

The courts below all found that the states, North Carolina, Tennessee, Georgia, Alabama and Mississippi, all enacted regulatory statutes which were permissive in nature (individual or collective tariffs could be filed) but none compelled the petitioners to file collective rates. The Fifth Circuit Court of Appeals held in this regard, "Having found that no state, the laws or regulations of which are at issue here, compels private parties to make joint rate-making applications, we find the state action exception inapplicable."[8] In so holding, the Fifth Circuit relied on this Court's holdings in Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773, 791 (1975); Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980) which

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[8] United States v. Southern Motor Carriers Rate Conference, 672 F.2d 469, 476 (5th Cir., Unit B, 1982).

were interpreted to contain a compulsion requirement.

The bifurcated test for state action immunity of (1) adequate public supervision and (2) a clear state purpose to displace antitrust law announced in Midcal cannot be satisfied by petitioners in the absence of a compulsion requirement. When the state compels a private party to perform an anti-competitive act clearly its purpose is to displace the antitrust laws.[9] Compulsion thereby becomes a measure of the state's intent. In the absence of compulsion, determining state intent becomes much more difficult.

The extent of state involvement may provide some indication of intent. Lack of adequate supervision may indicate no state

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[9] AREEDA & TURNER, I ANTITRUST LAW ¶ 215b3 (1 ed. 1978). ("Compulsion is evidence that the state intends to displace antitrust law - else its compulsion would have no effect. Similarly, where compulsion is lacking, intent to provide immunity is less likely.").

purpose to displace the antitrust laws. Areeda and Turner conclude that "[t]he Key question is whether the operative decisions about the challenged conduct are made by public authorities or by the private parties themselves. When the latter is the case, there is insufficient public control to confer antitrust immunity. * * * A state statute allowing or requiring competing producers to consult together and to agree on output or price would suffer a similar fate."[10] Here the states have allowed the petitioners to consult together and to agree on price. The petitioners have the freedom to so act or not. This indicates the state is passive as to its intent to displace competition since the ultimate decision to compete or not to compete has been placed in the hands of the private parties who decide whether to act unilaterally or collectively. Carrier members of the petitioners can file

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[10] Id. at ¶ 213b.

individual rates and thereby continue to compete against one another or carrier members can join the price-fixing conspiracy and file a collective rate.[11] The decision to join the collective rate-making conspiracy rests with the private parties. Each determines whether he/she/it will continue to compete or not.

The respective state agencies' acceptance of collective rate-making in their own self-interest (essentially to place the agency in a position where it processes fewer rate proposals) highlights the argument that the state action immunity doctrine should not be automatically extended to actions of state agencies. Here the agencies have not considered the public welfare in determining the reasonableness or justness of rates in view of the alleged antitrust violations.[12]

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[11] See Brief for Petitioner Southern Motor Carriers Rate Conference, Inc. at p. 5.

[12] This Court has required federal agencies to consider the antitrust implications in determining whether certain rates or

Instead, the parochial interests of the agency itself has been sought to be served by allowing collective rates to be filed to ease the regulatory burden.[13] The agency self-interest and intimacy with those whom it regulates should give this Court pause in considering whether the state action immunity doctrine should be extended to shield agency actions (or inaction). Can the agency in any meaningful and objective way determine whether the public interest in regulation which could be or is anticompetitive outweighs the national policy in favor of free and open competition?

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n.12 continued

practices are within the public interest and are just. See Gulf States Util. v. Federal Power Comm., 411 U.S. 747 (1973); Federal Maritime Commission v. Swedish American Line, 390 U.S. 238 (1968); United States v. Radio Corp. of America, 358 U.S. 334 (1959); McClean Trucking Co. v. United States, 321 U.S. 67 (1944).

13 Supra note 7.

III. The Noerr-Pennington Doctrine Has No Application Where Conspirators Engage In Price-Fixing Prior To Petitioning The Government.

Eastern R. R. Pres. Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961) provided the rationale and the genesis for what has become known as the Noerr-Pennington doctrine. The Noerr Court based its rationale for holding the Sherman Act inapplicable to the conspiracy of certain railroads to seek anticompetitive state legislation on three points. First, the Noerr Court did not wish to limit the right to petition government. Second, the Noerr Court wanted to keep the channels open to government for receiving information. Third, the Noerr Court separated "political action" from the Sherman Act's concern with economics.[14]

Areeda and Turner strongly suggest that the type of activity, collective rate-making, sought to be protected under the Noerr-

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[14] Supra note 9 at ¶ 204b.

Pennington doctrine by petitioners here should not be afforded such protection. "Consider a combination of competitors that discussed among themselves the 'appropriate price' for their product in order to petition the government for legislation that would support their price in some manner. This would constitute unlawful price collaboration, because their discussions create a severe danger for competition without being, in any way, indispensable for conducting protected political activity."[15]

Petitioners' characterization of collective rate-making as political activity is without substance. Collective rate-making is simply price-fixing and does not remotely resemble any customary political activity. In this case, petitioners are not petitioning government for the right to join together to fix collective rates rather they have fixed

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15 Id. at ¶ 205.

collective rates prior to government involvement. Under petitioners' rationale any price-fixing conspiracy could be formed and then petition government for acceptance and claim protection under Noerr-Pennington a result certainly not contemplated by the Noerr Court nor should it be countenanced by this Court.

The holdings below do not in any way limit petitioners' right to petition government nor do they close any channels for receiving information nor do they prohibit political activity. The holdings below simply prohibit anticompetitive behavior of the most egregious character, i.e., a price-fixing conspiracy. Petitioners remain free to petition the government, to have their members give the appropriate information to rate-approval agencies and to engage in political activity.

CONCLUSION

The Amici States assert that the state action immunity doctrine does not shield the

petitioners' anticompetitive behavior, namely price-fixing, from the reach of the Sherman Act. Even if such state involvement is not preempted by the federal antitrust laws it does not rise to the level of state action immunity as contemplated by Parker and its progeny. The petitioners' ultimate control over the decision to compete or not to compete places the decision to displace competition in the hands of private parties which is no different than the decision any price-fixing conspirator has made.

Further, no protection from the antitrust laws can be derived for the petitioners from the Noerr-Pennington doctrine. The anticompetitive behavior of the petitioners simply does not fit into "political action."

For these reasons, the decision of the Eleventh Circuit Court of Appeals (formerly the Fifth Circuit, Unit B), should be affirmed.

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STATE OF IOWA

STATEMENT OF CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of September, 1984, he deposited three copies of the foregoing document in a United States Post Office mailbox, with first class postage prepaid, and addressed to counsel for the petitioners and the Solicitor General of the United States Department of Justice, and all other counsel of record.

The undersigned further certifies that on the 17th day of September, 1984, he deposited forty (40) copies of the foregoing document in a United States Post Office mailbox, with first class postage prepaid, and addressed to the Clerk of the United States Supreme Court.

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General

MOTION FILED

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No. 82-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

and

NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.

and

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

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Date: September 21, 1984

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Industrial Transportation League (hereinafter the League) respectfully moves the Court for leave to file the attached brief *amicus curiae* in this case in support of respondent, as provided in Rule 36 of the Rules of this Court. Respondent has consented to the filing of such a brief. Petitioners were requested to consent but have declined to give such consent.

The League is a non-profit, incorporated trade association whose members include a large number of motor

carrier shippers, groups and associations of such shippers, boards of trade, and the like located throughout the United States. The members of the League, while utilizing all forms of transportation, are substantial users of the transportion services provided by motor carrriers of property in both intrastate and interstate commerce. The League is the largest organization representing the shippers – large, medium and small – who call upon such motor carriers for transportation of a tremendous variety of commodities.

The rates and charges which the League's members pay to motor carriers for their transportation services, both intrastate and interstate, are generally published in tariffs which are filed either with the Interstate Commerce Commission for transportation in interstate commerce, or with various agencies of the individual states (in most cases) for intrastate transportation. A substantial portion of such tariff publications contain rates, charges and related matters which are established after collective action by the motor carriers, acting in established groups which are generally known as rate bureaus. Insofar as it involves interstate transportation, such collective activity is immune from the application of the federal antitrust laws by the provisions of the Reed-Bulwinkle Act of 1948, as amended, 49 U.S.C. §10706(b).[1] These immunity provisions of the Interstate Commerce Act were substantially amended by the Motor Carrier Act of 1980.[2] The League and many of its members were intimately involved in the legislative deliberations which led to the Motor Carrier

[1]Ch. 491, §1, 62 Stat. 472 (Jan. 17, 1948), recodified Pub. L. 95-473, 92 Stat. 1377 (Oct. 17, 1978).

[2]Sec. 14, Pub. L. 96-296, 94 Stat. 803, 808 (July 1, 1980).

Act of 1980. It supports the new ratemaking freedoms given to motor carriers by Congress, and the transportation policy set out in 49 U.S.C. §10101(a)(2). In order to carry out that policy, it is the League's position that antitrust immunity should not be granted to motor carriers for the purpose of collectively setting rates.

For the same reasons, the League takes a similar position with respect to motor carriers engaged in intrastate transportation of property. The parties to this case are, of course, concerned with the application of the antitrust immunity doctrines at issue here to their specific factual circumstances. The League, however, is more concerned with the broader impact the Court's determinations of the issues presented will have on the permissible scope of the activities of the large number of motor carrier rate bureaus involved in intrastate collective ratemaking. The attached brief is submitted in the hope of assisting the Court in making these determinations.

Wherefore, it is respectfully prayed that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

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Date: September 21, 1984

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BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The state action immunity from the antitrust laws protects collective activity by motor carriers jointly to establish rates and charges within a particular state only to the minimum extent necessary to permit the state regulatory scheme to function. Moreover, unless the state compels motor carriers to engage exclusively in a non-competitive process for establishing such rates, the para-

mount federal interest in a competitive economy must be protected.

Finally, the *Noerr-Pennington* doctrine protects from the antitrust laws collective action to influence the government to take anticompetitive action, regardless of intent or purpose. However, the doctrine does not apply if the facts show conduct which constitutes independent acts not involving the type of activity protected by the doctrine.

ARGUMENT

Petitioners argue that their collective intrastate ratemaking activity is immune from the federal antitrust laws on two independent grounds, the state action doctrine and protected activity under the *Noerr-Pennington* doctrine. These arguments will be addressed separately below.

I. State Action Immunity

A. The State Action Immunity from the Federal Antitrust Laws Must Be Applied Only To The Minimum Extent Necessary.

Petitioners in this case argue first that the doctrine of state action immunity first enunciated by this Court in *Parker* v. *Brown,* 317 U.S. 341 (1943) requires reversal of the decision of the Court of Appeals.[1] Before discussing the application of that doctrine, the doctrine must be placed in its proper context.

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[1]The case below was heard and decided *en banc* by the "former Fifth Circuit" under the provisions of Section 9 of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994 (October 14, 1980). However, apparently because of the provisions of Section 11 of that Act, this Court has directed its writ of certiorari to the Eleventh Circuit.

It is available to prevent application of the federal antitrust laws only when a determination is made "that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597 (1976).

The different state statutes and the varying schemes for regulation of intrastate motor carrier rates and ratemaking must each be viewed astringently, so that only such immunity is applied as is necessary to allow the expressed policy of the particular state to be given effect. The state action doctrine provides immunity only when, in the first instance, "the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation."[2] Therefore, even when the doctrine applies, no more than such anticompetitive conduct as contemplated by the state may be immunized.

B. The Applicable Standard For State Action Immunity Requires That The States Compel the Motor Carriers To Engage In Anticompetitive Conduct.

In view of the principle that an implied immunity from the antitrust laws must be strictly construed, this Court has developed a test for determining whether to apply the doctrine to a particular set of factual circumstances. Before determining how to apply the appropriate test with respect to any particular state, however, the identity of the persons seeking to invoke the state action immunity as a defense is an important consideration. There is no claim that the states involved are acting directly, and therefore

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[2] *Hoover v. Ronwin*, ____ U.S. ____, 42 USLW 4535, 4538 (1984).

are immune as sovereigns from the antitrust laws. *Hoover* v. *Ronwin, supra,* 52 USLW at 4539 and *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 791 (1975). What is present here, as in most states, is a mixture of public and private decisionmaking involving both the motor carriers engaged in collective ratemaking and the state regulatory agencies which allow such activities under discretionary delegations by the state legislatures.

The motor carriers and their rate bureaus continue to have "sufficient freedom of choice" to conclude that they must be held responsible under the antitrust laws for the consequences of their actions. *Cantor* v. *Detroit Edison, supra,* 428 U.S. at 593. Therefore, in cases such as this one, where the petitioners claim they are acting as non-sovereign representatives authorized by the states to act in an anticompetitive fashion to establish motor carrier rates, this Court must require a demonstration by the motor carriers of a high degree of direction and involvement by the state. The test that has been developed by this Court in a number of recent cases (and was summarized by the Court in the recent decision in *Hoover* v. *Ronwin, supra,* 52 USLW at 4538), requires a clearly articulated statement of state policy choosing a non-competitive environment and an active state supervision of the policy:

> Closer analysis is required when the activity at issue is not directly that of the legislative or supreme court, but is carried out by others pursuant to state authorization. *See, e.g., Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982) (municipal regulation of cable television industry); *California Liquor Dealers* v. *Midcal Aluminum,* 445 U.S. 97 (1980) (private price-fixing arrangements authorized by State); *New Motor Vehicle Board of California* v. *Orrin*

> *W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by state administrative board). In such cases, it becomes important to ensure that the anti-competitive conduct of the State's representative was contemplated by the State. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413-415 (1978) (opinion of Brennan, J.); see *New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 369-370 (CA9 1974). If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of Parker is inapposite. As a result, in cases involving the anti-competitive conduct of a non-sovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. *Boulder, supra,* at 54. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See *Midcal Aluminum, supra,* at 105; *Goldfarb, supra* at 791. [footnote omitted] 45 USLW at 4538.

The Court of Appeals correctly recognized that, in order to satisfy the first part of the test set out in *Hoover* v. *Ronwin, supra,*[3] actions by the state as sovereign compelling the private motor carrier rate bureaus to engage in anticompetitive conduct must be present. As both *Cantor, supra,* 428 U.S. at 593, and *Goldfarb, supra,* 421 U.S. at

[3]Although that decision occurred after the court of appeals decision under review, it broke no new ground but summarized the development in prior decisions of this court of the state action doctrine as it applied to private parties. Compare *U.S.* v. *SMCRC, supra,* 702 F.2d at 535-541, which analyzes the same cases.

791, point out, an absence of freedom of choice for the private parties is an essential element of the doctrine. Evidence of compulsion (i.e. an absence of freedom of choice) is the best evidence that there has been a clear articulation of a state policy to have private motor carriers act in a manner contrary to the federal antitrust laws by collectively establishing their rates and charges.

The Court of Appeals correctly analyzed the state statutes involved, and found that there were no provisions requiring or compelling collective activity. It recognized that there was a greater or lesser degree of state regulation of motor carrier rates and charges. But, as the court below pointed out, there certainly was no action by the state legislature to require or direct the motor carriers to act *collectively* to establish the rates which are thereafter subject to regulation. *U.S.* v. *SMCRC,* 702 F.2d at 537. At best, the statutes involved allow, but do not require, collective action. In short, they do not "replace competition with regulation." *Hoover* v. *Ronwin, supra,* 52 USLW at 4538.

This Court has long recognized the primacy of the federal interest in free competition over less substantial state interests. *California Liquor Dealers* v. *Midcal Aluminum,* 445 U.S. 97, 110-111, 113-114 (1980). Unless and until a state acts to compel non-competitive collective ratemaking by motor carriers to the exclusion of "free and unfettered competition"[4] the ascendancy of the antitrust laws must be protected.[5] It would not be protected if the

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[4]*Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

[5]Given the principle that the Sherman Act, in particular, encompasses the full reach of the Commerce Clause, *Midcal, supra,* 445 U.S. at 111, there can be doubt that the federal antitrust laws are applicable to collective activities otherwise beyond the scope of other federal regulatory statutes. Cf. *U.S.* v. *SMCRC,* 439 F. Supp. 29, 33-38 (N.D. Ga., 1977).

state action immunity could be invoked when there is a scheme of regulation which only partially displaces competition, no matter how pervasive it may be.

Shippers who utilize motor carriers for intrastate transportation services must be able to depend, to the fullest extent possible, on the operation of free markets to provide them with a wide range of price and service options. Only when a particular state clearly articulates and actively supervises a policy that relies exclusively on a non-competitive environment for the establishment of intrastate motor carrier rates should shippers be prevented from realizing the benefits of free competition in the intrastate motor carrier industry. As long as a state regulatory scheme allows motor carriers the freedom to choose between either competitive or non-competitive courses of conduct, then the federal interest in enforcing the national policy in favor of competition must be given priority.

II. *Noerr-Pennington* Immunity

Petitioners also contend that the *Noerr-Pennington* doctrine immunizes their actions from application of the antitrust laws. That doctrine, as developed by *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) and its progeny, states that efforts to influence the government to take anticompetitive action cannot be the basis of antitrust liability. Since this immunity doctrine is based on the right of petition under the U.S. Constitution, Amendment I,[6] (*California Transport*

[6]"Congress shall make no law . . . . abridging . . . the rig'ıt of people to peaceably assemble, and to petition the Government for a redress of grievances."

v. *Trucking Unlimited,* 404 U.S. 508, 510-511 (1972)), the immunity:

> "Shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.
>
> * * *
>
> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."

United Mine Workers v. *Pennington,* 381 U.S. 657, 670 (1965). The doctrine includes within its scope joint activities supporting the petitioning activity, in order to make it effective and meaningful. *See Feminist Women's Health Center* v. *Mohammad,* 586 F.2d 530, 543 (5th Cir., 1978), *cert. den.* 444 U.S. 924 (1979).[7]

Of course, as the district court and the court of appeals in this case pointed out,[8] if the facts developed in a particular case demonstrate the existence of "independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine." (672 F.2d at 477, quoting from 467 F. Supp. at 485), then antitrust immunity is not available.

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[7] *Cf. State of Missouri* v. *National Oreganization for Women,* 620 F.2d 1301, 1314-1316 (8th Cir.), *cert. den.* 449 U.S. 482 (1980), where it was held that an economic boycott intended primarily to influence political action was not illegal under the antitrust laws.

[8] The *en banc* court of appeals adopted that portion of the court of appeals panel's opinion on *Noerr-Pennington* (702 F.2d at 542). The panel in turn adopted almost entirely the district court's analysis. See 672 F.2d at 476-77 and 467 F. Supp. at 484-85.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Date: September 21, 1984